

# SUPPLEMENT

Cule: 102.646-50 - 1014692  
TO THE

## American Journal of International Law

VOLUME 29

1935

50

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### CODIFICATION OF INTERNATIONAL LAW

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371  
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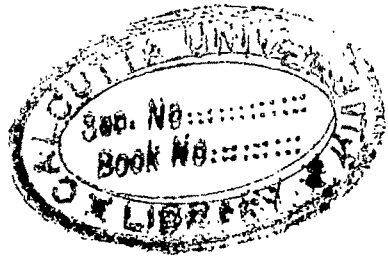
PUBLISHED BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

PUBLICATION OFFICE:  
THE RUMFORD PRESS  
CONCORD, N. H.

EDITORIAL AND EXECUTIVE OFFICE:  
700 JACKSON PLACE  
WASHINGTON, D. C.

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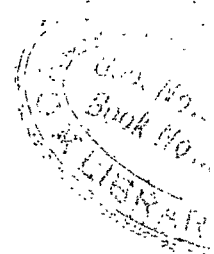
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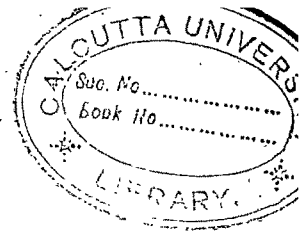
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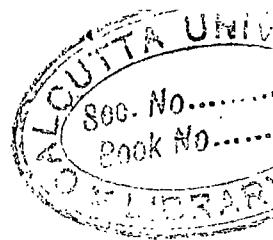
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## THE THIRTEENTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE<sup>1</sup>

BY MANLEY O. HUDSON

*Bemis Professor of International Law, Harvard Law School*

In some respects, the thirteenth year of the activities of the Permanent Court of International Justice has been in keeping with the tradition associated with that number. Though three sessions of the Court have been held, during part of the year the judges have not been kept busy; and possibly because of general conditions prevailing in the world, the activities of governments with reference to the Court have proceeded at a somewhat slackened pace.

During 1934, the Court was in session for 120 days. The 31st session, from February 1 to March 22, 1934, was largely devoted to the Lighthouses Case between France and Greece, in which a judgment [No. 22] was given on March 17, 1934; the 32d session, from May 15 to June 1, 1934, was devoted to a study of the Rules of Court with a view to their revision; the 33rd session, from October 22 to December 12, 1934, was devoted to the Oscar Chinn Case between Belgium and Great Britain, in which a judgment [No. 23] was given on December 12, 1934.

### THE LIGHTHOUSES CASE

By a special agreement of July 15, 1931, the French and Greek Governments submitted to the Court a dispute which had arisen out of the latter's refusal to give satisfaction to claims made by a French firm, Collas & Michel, concerning the validity of a contract concluded by that firm with the Ottoman Government, April 1/14, 1913. The Court was asked to decide whether the contract of April 1/14, 1913, was "duly entered into" and was "accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently." The special agreement was notified to the Court by both parties on May 23, 1933, and the notification was deemed by the Court to be sufficient proof of the agreement having been brought into force. Time limits for the written procedure were not fixed until after both parties had notified the Court of the appointment of their agents, on July 28, 1933. In fixing them, the Court followed the proposals of the parties as contained in the special agreement; as these proposals referred only to cases and counter-cases, the parties were taken to have dispensed with the submission of

<sup>1</sup> Continuing the series of annual articles begun by the writer in this JOURNAL, Vol. 17 (1923), p. 15.

replies. The Greek Government designated M. Séfériadès as judge *ad hoc*, and it was represented by diplomatic officers as successive agents and by M. Politis as counsel; the French Government was represented by Professor J. Basdevant, as agent. Oral statements, replies and rejoinders were heard by the Court from February 5 to 8, 1934, and the Court's judgment was given on March 17, 1934.<sup>2</sup>

In 1860, the French firm of Collas & Michel was granted a concession for the management, development and maintenance of a "system of lights on the coasts of the Ottoman Empire in the Mediterranean, the Dardanelles and the Black Sea," for a period of twenty years beginning in 1864. The concession authorized the concessionnaires to collect lighthouse dues, from which they were to receive their remuneration; but half of the receipts were reserved to the Ottoman Government, which from time to time pledged its share of the receipts as security for loans. By renewals in 1879 and 1894, the duration of the concession was prolonged until 1924. The contract of 1913, upon which the Court was asked to give its decision, provided for a further renewal for 25 years, *i.e.*, until September 4, 1949.

On April 1/14, 1913, the Sultan by a decree law authorized the Ottoman Minister of Finance to conclude a contract for a renewal of the concession; the contract was signed on that day, and instruments relating to a loan made by the concessionaire to the Ottoman Government were signed on the following day. The decree law was later published, and it was ratified by the Turkish Parliament December 18/31, 1914. In April, 1913, the military operations of the first Balkan War were still under way, and much of Turkey's territory was in enemy occupation; before the end of the month, preliminary peace conditions had been accepted, but the Treaty of London<sup>3</sup> concluded on May 17/30, 1913, was never ratified. At the close of the second Balkan War, however, the Treaty of Athens,<sup>4</sup> concluded on November 1/14, 1913, and brought into force some days later, maintained the territorial clauses in the Treaty of London which provided for Turkey's cession of some of the territories to which the lighthouse agreements related. Some negotiations were conducted concerning the concessions, but they were without definite issue. During the World War, steps were taken by the Greek Government toward taking over the lighthouses in territory transferred to Greece, but the Lighthouse Administration seems to have continued its collection of dues until 1929. On July 24, 1923, a protocol (XII) relating to certain concessions in the Ottoman Empire was signed at Lausanne; Article 1 of this protocol provided for the maintenance of "concessionary contracts and subsequent agreements relating thereto, duly entered into before the 29th October, 1914."<sup>5</sup> Thereafter, beginning in 1924, claims of the Lighthouse Administra-

<sup>2</sup> Series A/B, No. 62.

<sup>3</sup> 107 British and Foreign State Papers, p. 656; this JOURNAL, Vol. 8 (1914), Supp., p. 12.

<sup>4</sup> 107 Bt. and For. St. Papers, p. 893; this JOURNAL, Vol. 8 (1914), Supp., p. 46.

<sup>5</sup> 28 League of Nations Treaty Series, p. 203.

tion based on the renewal contract of April 1/14, 1913, were actively supported in diplomatic negotiations by the French Government.

The Court first addressed itself to the import of the question of which it was seised, and to the interpretation of the question whether the contract was "duly entered into." It was agreed that this phrase had been borrowed from Article 1 of the Lausanne Protocol of 1923. The French Agent contended that the phrase referred only to Ottoman law; the Greek Agent contended that it embraced also the effect of the contract in imposing on Greece obligations with respect to the Greek territories in which the lighthouses were located. The Court stated that "where the context does not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice,<sup>6</sup> has to consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties." The conclusion was reached that as the expression "duly entered into" was used in the Lausanne Protocol, it referred only to "the fulfillment of the requirements of Ottoman law"; but it was not clear that the expression had been used in this sense in the special agreement. After a study of various drafts of the special agreement, the Court decided that it could not "omit from consideration the objections of an international character opposed by the Greek Government to the arguments of the French Government." It was said that "even if each Party thought that the words 'duly entered into' in the Special Agreement were used in the same sense as in Protocol XII, there was no agreement between them as to what the words meant in the Special Agreement, because they were attributing different meanings to the words in Protocol XII."

The Court then examined an argument of the Greek Agent that it was not the intention of the parties to the contract of April 1/14, 1913, to renew the concession as to Turkish territories then in enemy occupation. As the contract effected a renewal of an old concession, the burden of proof of an intention to limit the scope of the concession to lighthouses in territory which was to remain Turkish rested on the Greek Government, and it had not been discharged. The fate of all the occupied territories had not then been decided; some occupied islands were in fact restored to Turkey. "Even if there had been a generally accepted rule of international law forbidding a sovereign State from taking measures in respect of occupied territory, the Parties to the contract of 1913 might have had in view the possibility that special provisions in the future peace treaties would subsequently accord recognition to the concessions." It was held that "the scope of the contract of April 1st/14th, 1913, is not therefore limited by reason of the fact that certain territories were occupied at that date by the Balkan Allies."

On the question of the validity of the contract according to Ottoman law, the Court admitted that "a contract granting a public utility concession

<sup>6</sup> For an analysis of this practice see Hudson, *Permanent Court of International Justice* (1934), pp. 379, 563-566, 572.

does not fall within the category of ordinary instruments of private law." It was to be ascertained "whether all formalities have been fulfilled and, in particular, that legislative authorization, if that was necessary, has been given." While Ottoman law "does not always require the participation of the legislature in the granting of a concession," such participation was required in some cases by a law of June 10/23, 1910. Hence the Court was bound to consider the validity of the decree law of April 1/14, 1913, issued not as a result of parliamentary legislation but by the Government acting under Article 36 of the Ottoman Constitution. This article prescribed for a decree law that an "urgent necessity" should exist, that the measure should be one "for the protection of the State against some danger or for the preservation of public safety," and that the law should be later duly submitted to the Turkish Parliament. On the question of "urgent necessity," the Court said that "it is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is alone qualified to undertake." Hence the Court did not examine further into this point, though it was observed that "in Turkish constitutional practice, the field of extraordinary legislation has been a very wide one," and that in 1913 the Ottoman Treasury must have been in urgent need of the loan for obtaining which the renewal of the concession was essential. A decree law regularly issued in Turkey acquired "full legal force" at once. The Greek Agent contended that inasmuch as the validity of the decree law depended upon submission to Parliament and ratification by Parliament, and inasmuch as the law of April 1/14, 1913, was not ratified until after the cession to Greece, the ratification produced no legal effect. This view was not taken by the Court, which refused to compare "the promulgation of a decree law and the making in private law of a contract" subject to a condition. The decree laws have "a provisional character" which "does not affect the legal force they enjoy up till the time of their rejection by Parliament." The legislative force of a decree law is not dependent on ratification and it continues in the absence of unfavorable action by Parliament. In this case there was no refusal to ratify, and the Court found it "unnecessary to examine whether the cession of the provinces to Greece really incapacitated the Turkish Parliament from ratifying a decree law which, as a fact, merely authorized the Minister of Finance to conclude a contract disposing, amongst other property, of light-houses situated in those provinces." Under Turkish law the decree law was not tainted with nullity because some of the territories were in enemy occupation. Hence the conclusion is reached that the decree law was valid in Turkish law and that consequently the contract was valid.

As a matter of international law the Court found it unnecessary to say whether "the territorial sovereign is entitled, in occupied territory, to grant concessions legally enforceable against the State which subsequently acquires the territories which it occupies." In this case the subrogation of the

Greek Government was a consequence of Article 9 of the Protocol of Lausanne.<sup>7</sup> The contract of April 1/14, 1913, being valid in Turkish law, that article was clearly applicable. It was contended by the Greek Agent that the contract did not satisfy the requirements of international law because of the special circumstances under which it was made and that such satisfaction was necessary under the Lausanne Protocol. The Court found this contention to be based upon misinterpretation of the protocol. The Greek Agent also contended that the treatment of the concessions was a question which was definitely settled by the Treaty of Athens of November 1/14, 1913, which came into force November 16/29, 1913, but the Court did not find this to be the case and it refused to accept the Greek Government's objection that it had signed the Protocol of Lausanne in the belief that it did not in practice differ from the terms of the Treaty of Athens.

The Court was only called upon to decide a question of principle; it was not called upon to specify which were the territories detached from Turkey and assigned to Greece. It decided that the contract of April 1/14, 1913, "was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently." Judge van Eysinga was in agreement with the operative clause of the judgment, but declared that he was unable to accept certain of the grounds upon which it was based. Judge Anzilotti and Judge *ad hoc* Sfériadès dissented.

Judge Anzilotti thought that the question before the Court was to be resolved by the application of Article 1 of the Lausanne Protocol. He considered that "concessionary contracts duly entered into" within the meaning of that article were only those in regard to which all conditions requisite in Ottoman law had been fulfilled. He stressed the word "duly" because of "a fundamental rule in interpreting legal texts that one should not lightly admit that they contain superfluous words." He found it necessary to have recourse to preparatory work relating to the Lausanne Protocol and he reviewed the history in detail, concluding that the contract of April 1/14, 1913, did not satisfy the condition prescribed by Article 1 of the Lausanne Protocol and that therefore Article 9 of the Lausanne Protocol was inapplicable. The whole of the Lausanne Protocol was "of an exceptional character." Hence "a strict application of the conditions governing the subrogation referred to

<sup>7</sup> Art. 9 of the Lausanne Concessions Protocol provides: "In territories detached from Turkey under the Treaty of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other Contracting Powers, and companies in which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority. The same provision will apply in territories detached from Turkey after the Balkan Wars so far as regards concessionary contracts entered into with the Ottoman Government or any Ottoman local authority before the coming into force of the Treaty providing for the transfer of the territory. . . ." 28 League of Nations Treaty Series, pp. 203, 209; this JOURNAL, Vol. 18 (1924), Supp., pp. 98, 101.

in Article 9 is not only in harmony with the rules for the interpretation of texts, but also in conformity with the requirements of equity."

Judge *ad hoc* Sefériadès insisted upon interpreting the special agreement as a whole. He concluded that the contract of April 1/14, 1913, was not duly entered into under Ottoman law and did not even cover the lighthouses situated in the territories occupied by Greece at the time of signature. Even if it had covered these lights, however, he thought it had been definitely disapproved by Turkey so that it could not be operative as against Greece. The following statement is of particular interest: "Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law. An honest man does not cede something which he has already ceded to another party. There is no ground for supposing that the Turkish Government in 1913 did anything so irregular as to cede rights to Greece which it had itself ceded to others, only a few months before." Assuming the validity of the contract of April 1/14, 1913, he found it impossible to say that the contract was binding upon Greece because of "a general principle of law" that "*nemo dat quod non habet*." He examines at some length Article 55 of the Regulations annexed to the Hague Convention of 1899 concerning the Laws and Customs of War on Land, citing in this connection the Casablanca Case. He concludes that an occupying state "alone has power to grant concessions capable of application whilst the occupation continues"; that the situation was not modified by the Lausanne Protocol. He points out that under the Court's judgment the question as to which are the territories to which the terms of the judgment apply is left open; he would have preferred to settle the whole of the dispute, though he thought that the Court's reservation was wholly justified. The answer given in the judgment appeared to him to be *infra petita*.

A phase of the procedure which is of interest is that the Court fixed no dates for the written proceedings until after it was notified of the appointment of agents by both parties. It is to be noted that although both France and Greece had made declarations under paragraph 2 of Article 36 of the Statute conferring obligatory jurisdiction on the Court, the French declaration had been cast in such terms that it was not applicable to this dispute; hence the special agreement seems to have been required. The special agreement of July 15, 1931, provided that following the judgment the pecuniary claims of Collas & Michel should form the subject of a settlement between that firm and the Greek Government; failing an agreement between them within one year, the claims are to be submitted to an arbitral tribunal, and the President of the Court may be called upon to appoint the president of this tribunal.

#### THE OSCAR CHINN CASE

On April 13, 1934, the Government of Belgium and the Government of the United Kingdom of Great Britain and Northern Ireland concluded a special

agreement submitting to the Court a dispute with regard to a claim by Great Britain in respect of loss and damage alleged to have been sustained by Oscar Chinn, a British subject resident in the Belgian Congo, due to certain measures taken in June, 1931, and subsequently, by the Belgian Government in connection with the *Union nationale des Transports fluviaux* and in relation to fluvial transport on the waterways of the Belgian Congo. The Court was asked to give judgment on the following questions:

1. Having regard to all the circumstances of the case, were the above-mentioned measures complained of by the Government of the United Kingdom in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom?
2. If the answer to question 1 above is in the affirmative, and if Mr. Oscar Chinn has suffered damage on account of the non-observance by the Belgian Government of the above-mentioned obligations, what is the reparation to be paid by the Belgian Government to the Government of the United Kingdom?

Before fixing the amount of any reparation payable, the Court was requested to indicate the principles upon which the reparation should be calculated. It was also requested to determine the procedure whereby the amount should be ascertained, if within a time limit to be fixed by the Court the parties failed to reach an agreement. The agreement entered into force on the date of signature, and it was communicated to the Court by both parties on May 1, 1934. In communicating the agreement to the Court, the two Governments announced the appointment of their agents, M. de Ruelle and Mr. W. E. Beckett, respectively. The British communication also stated that "with reference to Article 63 of the Statute of the Court and Article 60 of the Rules of Court," the case would "raise questions as to the construction of certain articles of the Convention<sup>8</sup> signed at Saint Germain-en-Laye on the 10th September, 1919, revising the General Act of Berlin,<sup>9</sup> 1885, and the Declaration of Brussels<sup>10</sup> dated the 2nd July, 1890."

The case was ready for hearing at the opening of the Court's 33rd session on October 22, 1934. Under Article 13 of the Rules, President Hurst was disqualified as a national of one of the parties, and the functions of the president were assumed by Vice-President Guerrero. In the oral statements made to the Court from October 23 to October 26, 1934, the British Agent was assisted by Mr. A. P. Fachiri, and the Belgian Agent was assisted by M. Dumont. The written proceedings, as provided for in the special agreement, included a case and a reply submitted by the British Agent, and a counter-case and a rejoinder submitted by the Belgian Agent. At the opening of the oral proceedings, the British Agent observed that the conclusion of the written proceedings had left a considerable divergence between the

<sup>8</sup> 8 League of Nations Treaty Series, p. 25; 1 Hudson, *International Legislation*, p. 343.

<sup>9</sup> 76 Br. and For. St. Papers, p. 4; 10 Martens, *Nouveau Recueil Général de Traités* (2d sér.), p. 414.

<sup>10</sup> 82 Br. and For. St. Papers, p. 55; 16 Martens, *N. R. G.* (2d sér.), p. 3.

parties in regard to several matters of fact; he suggested that the Court should decide in the first place the questions of law as to which the Governments were in dispute, and that thereafter the Court should direct an enquiry into the facts if this should be necessary. This suggestion was not opposed by the Belgian Agent. As the judgment of the Court, given on December 12, 1934,<sup>11</sup> answered the first question in the negative, there was no occasion to order the enquiry which had been suggested by the British Agent.

The facts presented related chiefly to the exploitation of fluvial transport on the River Congo. This river, "owing to the magnitude and extent of its waterways, constitutes the chief highway of the Belgian Colony. Penetrating, by means of its numerous tributaries, to the remotest confines of the territory, it makes it possible to exploit and turn to account the local sources of wealth of every part of the Colony, so that, from the point of view of the evacuation of products to be exported, it constitutes an essential factor in the commercial activities of the Colony." Down to 1925 transport services on the Congo were operated by or under the auspices of the Belgian Government, though not to the exclusion of private enterprises. In 1925 the *Union nationale des Transports fluviaux*, known as "Unatra", was organized, more than half of the shares being owned by the Belgian Government, and under its *cahier des charges* the company was largely in the control of the Government of the Colony; rates of transport were to be fixed by the Minister for the Colonies or by the Governor General; the Government was bound to entrust the company with the transport by water of its officials and goods, and to guarantee a certain return on the debentures of the company. "The Unatra company was in form a private company but it was charged, none the less—owing to the terms of its *cahier des charges*, and the supervision therein reserved to the State—with the conduct of an organized public service, involving special obligations and responsibilities, with a view, primarily, to satisfying the general requirements of the Colony."

In 1931 the depression was severely felt in connection with transport on the Congo, and on June 20, 1931, the Belgian Minister for the Colonies prescribed a reduction of rates of 60% to 75% for the handling of certain commodities in river transport by the various concerns whose tariffs the Government was in a position to control. The Colonial Administration was to reimburse these companies for losses incurred. The Government's decision of June 20, 1931, was originally instituted for three months, but the period was successively extended. On July 28, 1931, the Minister for the Colonies refused to grant equivalent terms to other transporters. On October 3, 1932, however, the Governor General promulgated a decision by the Minister of the Colonies extending to all transporters certain guarantees of losses incurred by reason of the Government's control of transport rates.

<sup>11</sup> Series A/B, No. 63.

Mr. Oscar Chinn, a British subject, had established a river transport and shipbuilding and repairing business at Leopoldville at the beginning of 1929, and he was the only fluvial transporter in the Belgian Congo who did not at the same time carry on business as a merchant or as a producer. Following the decision of the Government in 1931, Mr. Chinn found it impossible to continue his business; with other interested persons he brought actions against the Colony in the Court of First Instance at Leopoldville in 1932, claiming discrimination as a consequence of their exclusion from the benefits which had been extended to "Unatra" and claiming that the effect of the Government's decisions had been to establish in favor of "Unatra" a virtual monopoly of the river transport business downstream. The action was dismissed by the Court of First Instance and the dismissal was later upheld in 1932 by the Court of Appeals at Leopoldville.<sup>12</sup> Mr. Chinn's claim for damages was then espoused by the British Government.

The Court seems to have been disposed to regard the British Government as a plaintiff in the case, though it is not clear that any legal consequences were involved in so regarding it. "Having regard to the order in which the documents of the written proceedings were alternately filed, in conformity with the method proposed in the Special Agreement, and having regard also to the order in which the Agents were agreed that they should address the Court, and to their attitude during the pleadings, it is evident that, in the opinion of the Parties in the present suit, the British Government is, in fact, in the position of plaintiff, and the Belgian Government in that of defendant."

The losses sustained by Mr. Chinn were attributed by the British Government primarily to the decision of the Minister of the Colonies dated June 20, 1931, and the later refusal of the Belgian Government maintained until October 3, 1932, to extend the benefits of those decisions to fluvial transporters other than "Unatra". The parties were agreed in regarding the decision of June 20, 1931, as a governmental act, and the Court stated that "the fundamental issue in the present case is the lawfulness or otherwise under international law of the measures taken in 1931." The international obligations of the Belgian Government toward the British Government arise from the international régime of the Congo Basin under the Convention of Saint-Germain-en-Laye of September 10, 1919, and from the general principles of international law. Article 1 of the Convention of Saint-Germain, which is extremely important in this connection, reads as follows:

The signatory Powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the present Convention a complete commercial equality in the territories under their authority within the area defined by Article 1 of the General Act of Berlin of February 26th, 1885, set out in the Annex hereto, but subject to the reservation specified in the final paragraph of that Article:

Article 1 of the General Act of Berlin of February 26th, 1885.

<sup>12</sup> 9 See *Revue Juridique du Congo Belge* (1933), p. 64.

The trade of all nations shall enjoy complete freedom:

1. In all the regions forming the basin of the Congo and its outlets (according to the geographical boundaries).
2. In the maritime zone extending along the Atlantic Ocean (according to the geographical boundaries).
3. In the zone stretching eastwards from the Congo Basin (according to the geographical boundaries).

It is expressly recognised that in extending the principle of free trade to this eastern zone, the Conference Powers only undertake engagements for themselves, and that in the territories belonging to an independent sovereign State this principle shall only be applicable in so far as it is approved by such State. But the Powers agree to use their good offices with the Governments established on the African shore of the Indian Ocean for the purpose of obtaining such approval, and in any case of securing the most favourable conditions to the transit (traffic) of all nations.

It is also provided in Article 5 of the Saint-Germain Convention:

Subject to the provisions of the present Chapter, the navigation of the Niger, of its branches and outlets, and of all the rivers, and of their branches and outlets, within the territories specified in Article 1, as well as of the lakes situated within those territories, shall be entirely free for merchant vessels and for the transport of goods and passengers.

Craft of every kind belonging to the nationals of the signatory Powers and of States, Members of the League of Nations, which may adhere to the present Convention, shall be treated in all respects on a footing of perfect equality.

The Court regarded the Convention of Saint-Germain as the successor, "so far as the Parties in the case are concerned and as regards the relations between them, of the General Act of Berlin of February 26, 1885, and of the Act and Declaration of Brussels of July 2, 1890." The validity of the Convention of Saint-Germain had not been challenged by any government, and both parties had relied upon it as "the immediate source of their respective contractual rights and obligations." The parties did not agree however as to whether paragraph 1 of Article 1 of the Berlin Act was embodied in Article 1 of the Convention of Saint-Germain. The British Agent maintained that this was true, but the Court reached a contrary conclusion. The general principle of international law upon which the British Agent relied was the principle that all states must respect the vested rights of foreigners in their territories.

It was the British contention that "the Belgian Government by enjoining a reduction of tariffs on the 'Unatra' company in return for a promise of temporary pecuniary compensation made it impossible for the other fluvial transporters, including Mr. Chinn, to retain their customers and in consequence to carry on their business." Hence it was argued that "Unatra" was enabled to exercise a *de facto* monopoly and that this was incompatible with the Belgian Government's obligation to maintain commercial freedom and equality. The British Agent also contended that Mr. Chinn had been discriminated

against, contrary to the equality of treatment stipulated in the Convention of Saint-Germain, and that by making it commercially impossible for Mr. Chinn to carry on his business the Belgian Government had violated his vested rights which were protected by the general principle of international law. On the other hand, the Belgian Government defended the measures taken as a warranted safeguard of the interests of the community and it denied an intention to create a monopoly of any kind. The Belgian Agent therefore maintained that the measures taken were lawful from the standpoint of international law whether conventional or customary.

The Court defined the freedom of navigation referred to in the Convention of Saint-Germain to comprise "freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers." This is not equivalent to freedom of commerce. The Court recognizes that freedom of navigation and freedom of commerce are in principle "separate conceptions", though in this case it was not necessary to deal with them as such. While the Convention of Saint-Germain is based on the conception of commercial freedom, this conception did not have the same import in the Convention of Saint-Germain which it had in the Act of Berlin. "Freedom of trade, as established by the Convention, consists in the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry and in particular the transport business; or, finally, whether it is carried on inside the country, or, by the exchange of imports and exports, with other countries." Thus defined, freedom of trade does not mean abolition of commercial competition. The Court was unable to find in the measures taken by the Belgian Government any prohibition of Mr. Chinn's engaging in business which would constitute the creation of a monopoly in favor of "Unatra", and the British Government had contended that only a "de facto monopoly" was established. The Court could find merely "a natural consequence of the situation of the services under State supervision as compared with private concerns." While the measures taken might have reduced commercial competition, they had not violated the freedom of trade and freedom of navigation provided for by the Convention of Saint-Germain. It was not incumbent on the Belgian Government to guarantee success of each individual firm. "Having regard to the exceptional circumstances in which the measures of June 20, 1931 were adopted and to the nature of those measures, that is to say, their temporary character and the fact that they applied to companies entrusted by the State with the conduct of public services, these measures cannot be condemned as having contravened the undertaking given by the Belgian Government in the Convention of Saint-Germain to respect freedom of trade in the Congo." The circumstances precluded any idea that the Belgian Government intended by indirect means to escape its obligations.

As to the equality of treatment provided for in the Convention of Saint-Germain, the form of discrimination which is forbidden is discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups. Any favoring of "Unatra" was due to its position as a company under State supervision and not to its character as a Belgian company. The position of Mr. Chinn as a British national was neither better nor worse than that of other transporters not under State supervision.

With reference to the Belgian Government's obligation under the general principles of international law to respect vested rights, the Court could not see in Mr. Chinn's original position "anything in the nature of a genuine vested right." "Favorable business conditions and goodwill are transient circumstances, subject to inevitable changes." The fact that in 1932 the Belgian Government agreed to extend to other transporters advantages similar to those given to "Unatra" is not to be construed as an admission by the Belgian Government of a legal obligation to indemnify transporters for an encroachment on their vested rights. It was rather an act of grace.

Hence the judgment of the Court was that the measures taken in June, 1931, and subsequently by the Belgian Government in connection with "Unatra" and with relation to fluvial transport on the waters of the Belgian Congo were not, "having regard to all the circumstances of the case, in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom."

This judgment was decided upon "by six votes to five." Eleven judges were present when the judgment was delivered and apparently these were the judges who cast the eleven votes. Appended to the judgment, however, is a statement that Judge de Bustamante "who took part in the deliberation and in the vote on the judgment was compelled to leave The Hague before it was delivered;" and it is added that Judge de Bustamante had stated "that he concurred both in the operative part of the judgment and in the grounds on which it was based." If Judge de Bustamante took part in the vote and if his participation was effective, it would seem that twelve votes must have been cast and that the judgment must have been decided upon by seven votes to five. It is a curious feature of the Court's objectionable practice of stating the views of absent judges that in determining the number of votes by which a judgment is adopted no account seems to be taken of a vote by a judge who was not present when the judgment was delivered. The writer is unable to discover any reason for which a vote valid when given should not be counted in the final record.

Each of the five dissenting judges, President Hurst and Judges Altamira, Anzilotti, Schücking and van Eysinga, delivered a separate dissenting opinion. Judge Schücking concurred in the opinion of Judge van Eysinga, however, merely adding "a few observations."

The most striking of the dissenting opinions is that by Judge van

Eysinga. He addressed himself first of all to the question whether the States signatory to the Convention of Saint-Germain were entitled to consider the General Act of Berlin (except for Article 1) and the Declaration of Brussels "as abolished *inter se*, and to replace these instruments *inter se* by the articles of the Convention of Saint-Germain." Of the various parties to the Berlin Act, Austria, Hungary, Denmark, Germany, The Netherlands, Russia, Spain, Sweden, Norway and Turkey were not parties to the Convention of Saint-Germain. "The Berlin Act presents a case in which a large number of States, which were territorially or otherwise interested in a vast region, endowed it with a highly internationalized Statute, or rather a constitution established by treaty, by means of which the interests of peace, those of 'all nations' as well as those of the natives, appeared to be most satisfactorily guaranteed." The Act does not authorize the Contracting States to conclude private arrangements separately among themselves, and "such modification would not be appropriate in the case of a convention bestowing an international statute upon a vast area." While the régime which forms an indivisible whole may be modified, this can be done only by the agreement of all the contracting Powers. Yet all of the contracting Powers were not invited to the conference which drew up the Convention of Saint-Germain, and did not participate in the attempted modification of the Berlin Act. "This is a legal situation of such importance that a tribunal should reckon with it *ex officio*. The only convention which the Court could apply is the Act of Berlin." In this case the international obligations of Belgium should be found in the Act of Berlin as modified in 1890 at Brussels. "The two Parties have no right to change this treaty basis by means of statements made in the course of legal proceedings."

Judge van Eysinga expresses his "regret that the Court should frequently be called upon to give decisions in regard to collective conventions concluded after the Great War, without having at its disposal the records of the meetings at which these conventions were elaborated, these records being kept secret."

On the facts of this case, Judge van Eysinga found that the Berlin Act prescribed complete equality of individual treatment for all persons in the Congo Basin. This individual equality was not modified by the Convention of Saint-Germain. The measures taken by the Belgian Government had violated this equality, and they were therefore in conflict with the international obligations of the Belgian Government towards the United Kingdom. On the subject of freedom of navigation, Judge van Eysinga disapproved of the Belgian contention which would distinguish the management of a national fluvial industry from freedom of navigation. "From the very beginning," he says, "freedom of fluvial navigation has been understood as an element of international trade," and it is not confined to a mere freedom of movement. An impediment to freedom of navigation exists as soon as the freedom of navigation ceases to be effective. Belgium was not entitled to

deprive a foreign enterprise of its customers by conferring a virtual monopoly upon another fluvial transport concern. If the measures taken had the effect of concentrating in the hands of "Unatra" the fluvial transport business by rendering it commercially impossible for Mr. Chinn to engage therein, those measures would be inconsistent with the right of entirely free navigation conferred by Article 13 of the General Act of Berlin and reaffirmed by Article 5 of the Convention of Saint-Germain. Yet the facts alleged by the British Government have not been established, and the enquiry into the facts suggested by the British Agent should have been ordered.

The Court is not tied to any system of taking evidence, whether proceedings are begun by Special Agreement or by Application. Its task is to co-operate in the objective ascertainment of the truth. Of course, it behoves the parties to a Special Agreement as far as possible to produce proof of their statements—if for no other reason than because it is to their interest—and the Governments concerned have not omitted to do this. But when one party has done its best to produce proof of its assertions and admits that perhaps it has not succeeded, and suggests that the Court should apply Article 50 of the Statute, the Court must have very strong reasons for not adopting this course, more especially if, as in the present case, the facts to be established all transpired outside the territory of the Party adducing them.

In support of Judge van Eysinga's views, Judge Schücking made a very interesting statement concerning invalid treaties. He admitted that "the doctrine of international law regarding questions of this kind is not very highly developed. There is no clear and generally recognized doctrine regarding 'acts which are automatically null and void,' and acts of which the nullity is only relative." In his view "the nullity contemplated by the Congo [Berlin] Act is an absolute, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment; and the Convention concluded in violation of the prohibition is automatically null and void."

Judge Anzilotti thought that it was not adequately proved that the measures taken by the Belgian Government were bound to result and did in fact result in concentrating the river transport business in the hands of "Unatra," by making it commercially impossible for other transporters to engage in that business. As the case depended mainly on the appraisal of the facts, the Court should have ordered the special enquiry suggested by the British Agent. Yet this would have involved a preliminary determination that the evidence as to a *de facto* monopoly was material. Judge Anzilotti would have formulated as follows the problem before the Court:

Assuming to have been duly established the facts alleged by the Government of the United Kingdom and tending to prove that the decision of June 20th, 1931, and the application of that decision were bound to result and did in fact result in concentrating the river transport business in the hands of Unatra by making it commercially impossible for other transporters to engage in that business, are these measures in conflict with the international obligations incumbent on Belgium under the Convention of Saint Germain?

The freedom of fluvial navigation provided for in Article 5 of the Convention of Saint-Germain is a freedom "both as regards movements of shipping, or navigation in the strict sense of the word, and as regards the carriage of passengers and cargo." There is nothing in the text of Article 5 to justify a belief that it is only aimed at legal prohibitions of navigating or of carrying cargoes. That article protects navigation as a branch of economic activity, as a business. Its purpose was to open the commercial exploitation of the waterways of the Congo Basin to everybody. It assures "not an abstract and academic freedom but a tangible and effective freedom: the freedom to engage in a business in order to reap its profits." Judge Anzilotti found it impossible to believe that the Belgian Government was left free to "adopt measures as a consequence of which no one else but Unatra could continue in business without the certainty of incurring heavy losses." The circumstance that the Belgian Government acted to meet the dangers of the economic depression was not to be taken into consideration. "It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements." Judge Anzilotti admits, however, that the situation would have been entirely different if the Belgian Government had been acting under the law of necessity; yet no plea of necessity was made by the Belgian Government and certain of the facts were inconsistent with it.

Judge Altamira found a "very widely conceived" principle of equality in the Convention of Saint-Germain. "In fact," he said, "the idea of equality dominates the whole of the Convention." In view of the different circumstances surrounding the decision of June 20, 1931, Judge Altamira thought that the best legal description to fit it was that it constituted a privilege, because of the offer enabling transporters to offset losses. The privilege thus conferred solely upon one group of transporters was nothing less than inequality of treatment affecting a particular branch of commerce. Such inequality was prohibited by the Convention of Saint-Germain. The prohibition was not limited to discrimination based on nationality; although the term "nationals" is used in the convention, it is used merely to describe persons who are to be considered with reference to their commercial, shipping and other vocations. Nor is the prohibition in the convention limited to discrimination against foreigners in favor of Belgian nationals. The differential treatment resulting from the decision of June 20, 1931, was confirmed by the letter of July 28, 1931, which is also in conflict with the Convention of Saint-Germain. Judge Altamira wished therefore to give an affirmative answer to the question before the Court.

President Hurst thought the decision depended largely "on a correct appreciation of the facts and circumstances." The basis of the British Government's case was that the measures adopted were "in themselves unlawful, either by reason of the intention with which they were taken, or by reason of the consequences which they were bound to entail and which should have

been foreseen by the Belgian Government." Though the point had not been made clear, he took the latter to be the ground of the British Government's case. "The Belgian Government must have realized that the effect of the June measure would be that Unatra, carrying at one franc a ton, would get all the business and a private transporter, such as Chinn, carrying at the old rates, would get none." The concentration of the river business in the hands of "Unatra" resulted from the decision of June 20; the injury to Chinn resulted, if at all, from the refusal on July 28, 1931, to make a similar provision for repaying their losses to private transporters. President Hurst thought that the British contention that the Belgian action ran counter to Belgium's obligations under general international law was not well-founded. As both Governments had treated the Convention of Saint-Germain as "the operative instrument," President Hurst expressed no opinion on the question whether both Belgium and the United Kingdom had pledged themselves not to terminate or to modify the Berlin Act even as between themselves. He also refused to express an opinion on the question whether a new treaty made in violation of such a pledge would be devoid of juridical effect. Analyzing the Convention of Saint-Germain, he found that the Belgian Government was still under obligation to the Government of the United Kingdom to see that the trade of all nations enjoyed complete freedom. The Belgian measure of June 20, 1931, left transporters other than "Unatra" free to carry on their business if they so wished and if they could. The reduction of "Unatra's" tariff to one franc a ton, even if it did result in the company's getting all the business, did not infringe the liberty of business to which Chinn was entitled. On the subject of liberty of navigation, it was difficult for President Hurst to see how Chinn's liberty had been interfered with. He then dealt with the question whether there had been a discrimination against Chinn as a consequence of the action taken on July 28, 1931. He found that an actual discrimination did exist, and that the discrimination forbidden by the Convention of Saint-Germain did not have to be based upon nationality. Viewing the history of the Saint-Germain Convention in relation to the Berlin Act, he thought it impossible to deduce that the complete commercial equality provided for by the former was less extensive than that provided for by the latter. Hence he reached the conclusion that, so far as the decision of July 28, 1931, applied to Chinn, it was inconsistent with the international obligations of the Belgian Government to the United Kingdom.

#### THE CHACO DISPUTE

On November 24, 1934, the Special Assembly of the League of Nations, acting under paragraph 4 of Article 15 of the Covenant, adopted a report concerning the Chaco dispute,<sup>13</sup> with recommendations "deemed just and proper in regard thereto." These recommendations envisage the conduct of negotiations between Bolivia and Paraguay at a conference to be held in

<sup>13</sup> League of Nations Document, A. (Extr.) 5. 1934. VII.

Buenos Aires, with reference to "(a) the final delimitation of the frontier between the two countries; (b) security clauses; [and] (c) economic clauses." The recommendations then make provision, in paragraph 14, for a possible resort to the Court, as follows:

By accepting the present recommendations, the Parties agree that, if, on the expiry of a period of two months from the opening of the conference, the frontier shall not have been fixed by negotiations, or if no arbitration agreement shall have been concluded, the Permanent Court of International Justice shall be called upon to give judgment in accordance with the provisions hereinafter set out. Such acceptance shall be deemed to constitute a special agreement within the meaning of Article 40 of the Statute of the Permanent Court of International Justice, and the Secretary-General shall forward the present report to the Court on behalf of the Parties.

The Court shall examine all the circumstances of the case and shall apply the rules of law enumerated in Article 38 of its Statute, due regard being had to:

(a) The accession of the Parties to the Declaration of the American nations, dated August 3rd, 1932;

(b) The adherence of the Parties to the principle of the *uti possidetis* of 1810, which was accepted by both Parties at the Buenos Aires Conferences of 1928.

The jurisdiction vested in the Court shall be as follows:

Whereas there exists between Bolivia and Paraguay a territorial or frontier dispute and whereas what one Party considers to be exercise of its territorial sovereignty is considered by the other Party to be usurpation upon its rights and an illegal occupation, to examine the titles and arguments presented on either side, and, as the result of such examination, to give judgment and declare whether there are districts and, if so, what districts, which one or other of the Parties should evacuate and hand over to the other Party as falling under the latter's sovereignty, the two Parties undertaking in advance to accept and execute the judgment of the Court.

The Special Assembly also decided "to appoint an Advisory Committee to follow the situation, more especially as regards the execution of the Assembly's recommendations for the settlement of the dispute. . . ."; and in connection with the work of the Advisory Committee it envisaged a possible request to the Court for an advisory opinion,<sup>14</sup> by the following provision in the report:

<sup>14</sup> On Nov. 21, 1934, the Danish, Norwegian, Spanish, Swedish and Swiss delegations in the Assembly had proposed a decision by the Assembly that in the event of the parties' failure to adopt the Assembly's recommendations, the Court should be asked to give an advisory opinion on the following question (Document A. (Extr.)2.1934): "Whereas there exists between Bolivia and Paraguay a territorial dispute or a dispute relating to frontiers, and whereas what one of the Parties regards as the exercise of its territorial sovereignty is regarded by the other Party as an usurpation of its rights and an illegal occupation, are there any regions—and, if so, which—that should be evacuated and handed over by one of the Parties to the other?"

The Secretary-General shall submit to the Permanent Court of International Justice, on behalf of the Assembly, a request for an opinion under Article 14 of the Covenant, should the Advisory Committee of the Assembly consider such a consultation to be justifiable and opportune with a view to facilitating the performance of the task entrusted to it. The terms of the question and the date of the request shall be determined by the Committee.

The adoption of these provisions sets a new precedent. The action of the Assembly, as a whole, gives fresh indication of the possible availability of the Court for contribution to the maintenance of peace.

#### THE PENDING REVISION OF THE RULES OF COURT

At the time of the adoption of the 1931 Rules, the Court was of the opinion that further study was required with a view to a more general revision than that then made. Some revision would be necessary in any case, if the Revision Protocol of September 14, 1929, should come into force. On May 12, 1931, the Court selected various subjects for examination and entrusted four committees with their study. Some delay resulted from the uncertainty as to the Revision Protocol's coming into force. On May 12, 1933 the four committees were instructed to complete their work, if possible, by October 1, 1933, proceeding on the basis of the revised Statute.<sup>15</sup> The reports of the four committees were examined in March, 1934, and a coördinating committee was instructed to prepare bases of discussion; in May, 1934, the Court had before it the texts prepared by this coördinating committee, and made some progress in their consideration.<sup>16</sup> The promulgation of any new rules will probably be made to depend upon the fate of the Revision Protocol, however, and the fate of that instrument is as yet undetermined.

#### PROGRESS OF INSTRUMENTS RELATING TO THE COURT

No additions have been made during the year to the list of States which have signed or ratified the Protocol of Signature of December 16, 1920. Of the sixty members of the League of Nations on January 1, 1935, 53 have signed this protocol, but only 48 have ratified it.<sup>17</sup> Certain members of the League of Nations are therefore bound as such to contribute to the expenses of the Court, without being parties to the Protocol of Signature.

Nor have additions been made during the year to the list of States which have signed or signed and ratified the two Court protocols of September 14, 1929. The Protocol for the Revision of the Statute has, therefore, not been brought into force; for this result, action is still required by Abyssinia, Brazil, Panama and Peru. The Protocol for the Accession of the United States still awaits action by Abyssinia, Brazil, Chile, Haiti, Panama, Paraguay, Peru and El Salvador, as well as action by the United States of America.

<sup>15</sup> Series E, No. 7, p. 108; No. 8, p. 60; No. 9, p. 63.

<sup>16</sup> Series E, No. 10, p. 38.

<sup>17</sup> The total number of signatories is 55, and ratifications have been deposited on behalf of 49 of them.

With respect to the declarations under paragraph 2 of Article 36 of the Statute conferring obligatory jurisdiction on the Court, some progress may be reported. On May 30, 1934, the Hungarian Government made a declaration renewing its acceptance of the Court's obligatory jurisdiction for a further period of five years from August 13, 1934; a ratification of the declaration was deposited on August 9, 1934. On September 12, 1934, the Greek Government made a declaration accepting the Court's obligatory jurisdiction for a further period of five years from September 12, 1934; though subject to ratification, the declaration entered into effect upon signature. On September 18, 1934, the Abyssinian Government renewed its acceptance of the Court's obligatory jurisdiction for a period of two years from the date of signature; the previous Abyssinian declaration had expired on July 16, 1933, and strangely the new declaration is declared to have "retroactive effect covering the period comprised between July 16, 1933, and the date of signature of the present declaration." The new declaration by Abyssinia is not subject to ratification.

In consequence of these developments, declarations accepting the Court's obligatory jurisdiction were in force on December 1, 1934, for 42 States or members of the League of Nations.<sup>18</sup>

#### JURISDICTION CONFERRED ON THE COURT BY THE UNITED STATES OF AMERICA

Although the Protocol for the Accession of the United States, of September 14, 1929, has not come into force and the United States is not therefore a party to the Protocol of Signature of December 16, 1920, action has been taken by the Government of the United States which has had the result of conferring on the Court jurisdiction over certain disputes to which the United States may be a party. On August 20, 1934, the United States accepted an invitation to become a member of the International Labor Organization created under the Labor Part of the several treaties of peace of 1919 and 1920.<sup>19</sup> The Constitution of the Organization provides extensively (Articles 415-418, and 423 of the Treaty of Versailles) for the obligatory jurisdiction of the Court. Under Article 415, a complaint by one member that another member has not effectively observed the provisions of a labor convention which both have ratified, may under certain circumstances be referred to the Court; under Article 416, a member may resort to the Court because another member has failed to take the action required by Article 405 with reference to a draft convention or recommendation adopted by the International Labor Conference; and under Article 423, "any question or dispute relating to the interpretation of this Part of the present Treaty or of any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice." While the Court has not

<sup>18</sup> For a list of these States, see Hudson, *Permanent Court of International Justice* (1934), pp. 629-630.

<sup>19</sup> See this JOURNAL, Vol. 28 (1934), p. 669.

yet been called upon to act under any of these articles, they constitute an important source of its potential jurisdiction. As a member of the International Labor Organization, therefore, the United States has subjected itself to the compulsory jurisdiction of the Court in such a way that its becoming a party to the Protocol of Signature of December 16, 1920, would seem to be a very logical development.

#### DECISIONS TAKEN BY THE COURT

One of the most valuable parts of the annual reports published by the Court <sup>20</sup> is the digest of decisions taken by the Court in application of the Statute and Rules. This digest was begun in 1927, <sup>21</sup> and each of the annual reports since that date contains an addendum to the first instalment. It is the only published source of some of the various administrative and procedural decisions which are taken, and it constitutes a reservoir upon which any student of the Court's practice and procedure must draw heavily; it is also being cited by counsel before the Court. While it is admirable in its completeness, many of the references are unnecessarily blind, and the digest could be more easily used if names of cases and citations were not frequently omitted.

The seventh addendum of this digest <sup>22</sup> contains some interesting references to decisions taken. One of these references indicates that deputy-judges of the Court have quite definitely been relegated to an unimportant position; while they had taken part in the framing of the rules in 1922, and had been invited to submit proposed amendments in 1926, the Court seems to have been of the opinion that their position is "fundamentally different" since 1930 and they have not taken any part in the revision of the rules now under discussion. It is to be noted, also, that no deputy-judge has been summoned to sit on the Court since 1930.

A curious attitude seems to have been taken by the Court with reference to the summoning of all the judges for all the sessions. It would seem *a priori* that no session of the Court could be held to which every judge is not summoned; this would not mean, of course, that the presence of the judge would be essential when it is not necessary for a quorum. The practice seems to be, however, that judges known to be at such a distance from The Hague that they could not attend on a date fixed, and possibly other judges known to be unable to attend on a date fixed, are not always summoned. This practice was recently considered by the Court; <sup>23</sup> the justification of it which is given in the report of the discussion is certainly unsatisfactory. It is to be hoped that the new rules will clearly indicate that every judge not on long leave should be summoned to every session of the Court, and that the duty of a judge to attend, now stated in Article 27 of the Rules, will be made to apply to every session of the Court.

<sup>20</sup> In Series E. The latest volume is Series E, No. 10, covering the period from June 15, 1933, to June 15, 1934.

<sup>21</sup> Series E, No. 3, pp. 174-241.

<sup>22</sup> Series E, No. 10, pp. 151-176.

<sup>23</sup> Series E, No. 10, pp. 153-154.

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In a previous number of this series,<sup>24</sup> the writer criticized a practice of the Court which permits the appending to a judgment of a statement of the views of certain judges who participated in the deliberations on the case but were not present when the judgment was handed down, or when the terms of the judgment were finally settled. It now appears<sup>25</sup> that the practice was justified before the Court as being "in accordance with precedent." The practice is so objectionable, however, that only a long and unbroken series of precedents would justify it; and the earlier precedents,<sup>26</sup> to which the prestige of the Court seems to the writer to demand a return, are contrary to the recent practice.

The following passage in the digest<sup>27</sup> might lend itself to misinterpretation, and it is a case where the blindness of the reference should have been avoided:

In a case heard in 1934, it was observed that one of the governments concerned had, in its Counter-Case, relied upon certain arbitral awards but had not annexed them thereto. It was decided that these documents must be officially filed by the government in question. In order to save time, however, the Registrar obtained a supply of copies of these documents, and the Agent of the government concerned was requested officially to file two copies of each, one to be placed on the Court's record and the other communicated to the other party's Agent.

If these arbitral awards formed a part of the history of the negotiations in the case, the Court's decision would seem to have been justified. In the ordinary case, however, where a party cites and relies upon principles laid down in arbitral awards, such a decision would be unfortunate. The Court has declared that as a tribunal of international law it "is deemed itself to know what this law is";<sup>28</sup> in consequence, the Court's familiarity with the sources of international law is to be assumed, and it ought to be entirely free in its references to relevant arbitral decisions.

The digest reports an interesting decision<sup>29</sup> which bears upon the extent of the participation of judges *ad hoc*; even a definitive fixing of the order in which representatives of the parties are to address the Court seems to require the participation of such a judge.

The discharge of extra-judicial functions by the Court, or by the President, has now become a settled practice in such cases as the appointment of umpires or arbitrators.<sup>30</sup> Yet the following paragraph<sup>31</sup> seems to go beyond the practice in referring to a "moral duty" in this connection:

The Court was agreed in principle that, when a request of the kind was made by two governments or by the L. N., it was the moral duty

<sup>24</sup> See this JOURNAL, Vol. 28 (1934), p. 14.

<sup>25</sup> Series E, No. 10, p. 154.

<sup>26</sup> Series B, Nos. 2 and 3, p. 43; No. 4, p. 32.

<sup>27</sup> Series E, No. 10, p. 159.

<sup>28</sup> Series A, Nos. 20/21, p. 124.

<sup>29</sup> Series E, No. 10, p. 161.

<sup>30</sup> See Hudson, Permanent Court of International Justice (1934), pp. 375-376.

<sup>31</sup> Series E, No. 10, p. 164.

of the Court or the President, as the case might be, to comply with that request, though in the case of a request from private persons the position was rather different, and acceptance must be optional and depend on circumstances.

#### ATTENDANCE AT SESSIONS OF THE COURT

The 31st session of the Court was attended by eleven judges; Judge Urrutia was on long leave, and Judges Altamira, de Bustamante and Kellogg were absent. At the 32d session, Judges Altamira, de Bustamante and Kellogg were absent. At the 33d session, Judge Wang was on long leave, and Judges Adatci and Kellogg were absent for reasons of health; Judge de Bustamante was present at only part of the session. The following table indicates the extent of the judges' participation in the work of the Court since its reconstitution in 1931:

ATTENDANCE OF THE JUDGES—SESSIONS 1931-1934<sup>32</sup>

Judges	20	21	22	23	24	25	26	27	28	29	30	31	32	33
Adatci . . . . .	P	P	PA	P	P	PD	P	P	P	P	P	P	P	A
Altamira . . . . .	PA	P	P	P	P	P	A	A	A	A	A	A	A	P
Anzilotti . . . . .	P	P	P	P	P	P	P	P	P	P	P	P	P	P
de Bustamante . . . . .	A	A	P	A	A	PD	A	A	A	A	PA	A	A	PA
van Eysinga . . . . .	P	P	PD	P	P	PD	P	P	P	P	P	P	P	P
Fromageot . . . . .	P	P	P	P	P	PD	P	P	P	P	P	P	P	P
Guerrero . . . . .	P	P	PD	P	P	PD	P	P	P	P	P	P	P	P
Hurst . . . . .	P	P	P	P	P	P	P	PA	P	P	P	P	P	P
Kellogg . . . . .	A	P	PA	A	A	PA	A	A	A	A	PA	A	A	A
Negulesco . . . . .	P	P	P	P	A	P	P	P	A	P	P	A	P	P
Rolin-Jaquemyns . . . . .	P	P	P	P	P	PD	P	P	P	P	P	P	P	P
Rostworowski . . . . .	P	P	P	P	P	PD	P	P	P	P	P	P	P	P
Schücking . . . . .	P	P	P	P	P	PD	P	P	P	P	P	P	P	P
Urrutia . . . . .	P	PA	P	P	P	PD	P	P	P	P	L	L	L	L
Wang . . . . .	A	A	P	P	P	PD	P	P	P	P	P	P	P	L

P—Present; A—absent; D—disqualified under the Statute; L—on long leave.

#### DEATH OF JUDGE ADATCI

The passing of Mineiteiro Adatci, judge and former President of the Court, on December 28, 1934, is a very great loss, much to be regretted. Judge Adatci had in a remarkable degree the judicial temperament. Much of his active life had been spent in diplomatic posts in which he had rendered signal service. For a number of years before his election to the Court he had taken a prominent rôle in the work of the Assembly and the Council of the League of Nations, as the representative of Japan, and he had frequently been called upon to sit in a judicial capacity with respect to international disputes. His handling of the Optants question was particularly notable. Such activities had marked him for service on the Court, and his assumption of a judgeship in 1931 was immediately followed by his election to the Presi-

<sup>32</sup> The special constitution of the Court for a part of the 25th session was due to an application of Art. 13 of the Statute.

dency of the Court. In this office he showed the balance and vigor which had characterized his earlier services. Though he was present at two sessions of the Court in 1934, a long illness prevented his attending the session which closed shortly before his death. His name deserves to stand high in the annals of the Court's history, and his services in international coöperation reflect great credit upon his country.

#### THE COURT'S BUDGET FOR 1935

The entire budget of the League of Nations for 1935, as voted by the Fifteenth Assembly, amounts to 30,639,664 gold francs. Of this amount, 2,535,646 gold francs constitute the budget of the Court.<sup>33</sup> In 1934, the Court's budget was 2,538,827 gold francs; in 1933, it was 2,660,196 gold francs, of which only 2,332,569 were actually expended. The uncertainty as to the coming into force of the amendments to the Statute annexed to the Revision Protocol of September 14, 1929, still calls for the preparation of an alternative budget of the Court, as during several years past.

If the United States were a party to the Protocol of Signature of December 16, 1920, it would probably pay a contribution equal to that of the largest contributor, *viz.*, Great Britain. In 1935, Great Britain is to contribute to the budget 105 units out of a total of 1,011.38903 units; the British contribution to the expenses of the Court will therefore be about 263,244 gold francs, or something in excess of \$80,000 (at the present value).

#### LITERATURE OF THE COURT

Aside from the Court's own publications, which are both adequate and admirable, an extensive literature is now coming to exist with reference to the Court and its activities. This literature is rapidly growing throughout the world and in numerous languages, and the past year has been a fruitful one in this respect. During 1934, the first volume of a new series of *World Court Reports* under the writer's editorship was published by the Carnegie Endowment for International Peace; this series is planned to contain the English versions (or translations, as the case may be) of all the Court's judgments, orders and opinions. A tenth volume of *Entscheidungen des Ständigen Internationalen Gerichtshofs* was published in 1934, by the *Institut für Internationales Recht an der Universität Kiel*. The publication, also in 1934, of a volume entitled *Statut et Règlement de la Cour permanente de Justice internationale*, by the *Institut für Ausländisches Öffentliches Recht und Völkerrecht*, opens to students a mass of data and information not readily available heretofore. Of the quite recent works on the Court, mention may be made of *Les Principes de Droit des Gens dans la jurisprudence de la Cour permanente de Justice internationale* (1932), by J. Collette; of Pierre Derevitsky's *Les*

<sup>33</sup> Information concerning the Court's budget is published in League of Nations Official Journal, 1934, pp. 1263-1266, 1332-1338. For an explanation of the Court's finances, see Hudson, Permanent Court of International Justice (1934), pp. 297-312.

*principes du droit international tels qu'ils se dégagent de la jurisprudence de la Cour permanente de Justice internationale* (1932); of E. Dumbauld's *Interim Measures of Protection in International Controversies* (1932); of A. P. Fachiri's *The Permanent Court of International Justice* (2d ed., 1932); of the *Précis de Jurisprudence de la Cour permanente de Justice internationale* (1933), by Raoul Genet; of *Die Zuständigkeit Internationaler Gerichtshöfe* (1932), by Dr. B. von Geöcze; of *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofes* (1933), by E. Härle; of the writer's treatise on *The Permanent Court of International Justice* (1934), and his handbook on *The World Court, 1931-1934*; of *The Development of International Law by the Permanent Court of International Justice* (1934), by H. Lauterpacht; of H. G. Niemeyer's *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (1932); of Mario Scerni's *I principi generali di diritto riconosciuti dalle nazioni civili nella giurisprudenza della Corte Permanente di Giustizia Internazionale* (1932); and of Karl Schmid's *Die Rechtsprechung des Ständigen Internationalen Gerichtshofs in Rechtssätzen dargestellt* (1932).

This literature is producing a wide community of ideas with reference to the Court, a community which promises to be a source of its strength for the future. A dissonant note has recently been sounded, however, which seems to call for some comment.

In his *Précis de Jurisprudence* of the Court, M. Raoul Genet says (p. 8): "La Cour, à l'heure actuelle, se compose donc de quinze juges (en y incluant le juge américain qui, en réalité, n'a pas de titre régulier à y siéger)." ["At this time the Court is then composed of fifteen judges (including the American judge who, in reality, has not a regular title to a seat)."] The thought seems to be that an American judge cannot enjoy a regular status on the Court because the United States is not a party to the Protocol of Signature of December 16, 1920. It is a surprising statement, and so far as the writer's knowledge goes, it is made for the first time by M. Genet. What is its foundation? Certainly it is not to be found in the Statute of the Court, Article 2 of which provides for the election of judges "regardless of their nationality" (Fr., *sans égard à leur nationalité*). A denial that States may validly provide for the election of judges of other than their own nationality is refuted by the whole history of international adjudication. Moreover, the presence of an American judge on the Court from 1922 to date has never been challenged by any government, by any organ of the League of Nations, or by the Court itself. The conclusion seems to be inescapable that M. Genet's observation is wholly gratuitous and utterly without justification.

## THE CODIFICATION OF INTERNATIONAL LAW

BY PHILIP MARSHALL BROWN

*Of the Board of Editors*

One who was present during a discussion at Paris by President Wilson, Lloyd George, and Clemenceau concerning the subject of Mandates has stated that it was quite evident each was employing this novel term in a different sense. So it is with the term codification: like the Monroe Doctrine, whether you are in favor of it or opposed to it, codification is variously understood and interpreted. The discussions of the subject in the League of Nations in recent years indicate a serious divergence of opinion, although everybody would seem to favor some form of codification.

The definitions of codification given by the *Century Dictionary* are as follows:

The conversion of unwritten into written law.

To give orderly arrangement to this written law—to deliver it from obscurity, uncertainty and inconsistency—to clear it of irrelevancies and unnecessary repetitions—to reduce its bulk, to popularize its study and to facilitate its application. (Maine, *Village Communities*.)

A systematic and complete body of statute law intended to supersede all other law within its scope.

A body of law which is intended to be merely a restatement of the principles of existing law in a systematic form.

*La Grande Encyclopédie* defines a code as follows:

La réunion complète et systématique en un seul corps des lois applicables à une matière déterminée ou à un groupe des matières du même ordre.

La confection des codes est l'oeuvre du pouvoir législatif et c'est un véritable abus de langage de donner ce nom à des ouvrages privés, où l'on réunit des lois isolées, en les mêlant parfois à des décisions de la jurisprudence et de la doctrine. Tels sont les recueils sur la chasse, sur la presse, sur le notariat et bien d'autres, baptisés codes par leurs auteurs et éditeurs.

The Spanish *Enciclopedia Universal Ilustrada* notes three stages in the growth of law: the unwritten stage of customary law, the stage of compilation, and the final stage of formal codification.

It is of interest to note how the term code has been applied. The most striking illustrations which come to mind are the Code of Hammurabi, the Justin-

ian Code, the Amalfitan Code, the Code Napoléon, Lieber's Code of the Laws of War, and the Declaration of London concerning the laws of naval war. Of all these, only the Code Napoléon was enacted, legislative law. The Code of Justinian—more specifically the Pandects—was really a digest, a convenient compilation made by juriconsults. It was not statutory law in the strict sense of the term. The Amalfitan Code, likewise, was a summary statement of the prevailing customary law of admiralty. Lieber's Code was adopted as a set of rules and instructions for the use of the United States Army. The Declaration of London was a multilateral treaty embodying compromises which was never ratified or observed by all of the contracting parties. The common characteristic of all these so-called codes was in the *form*, namely, an orderly, systematic compilation; or, in other words, a kind of digest serving as an authoritative source book for reference. Only the Code Napoléon was *law* in the strictest sense, namely, a sovereign command to be obeyed and applied through the courts.

This conception of a code as an orderly, systematic compilation has always had a great attraction. Men naturally prefer a logical classification of laws for the sake of certainty and finality. They desire something more than unwritten customary law variously understood and applied by different judges and administrative officials. This, of course, is particularly true of the law of nations, which has seemed to many people to be little else than a nebulous system of moral rights and obligations in various stages of evolution and acceptance. The creation of the Permanent Court of International Justice at The Hague accentuated the necessity for a clearer and more authoritative statement of international law. The nations resorting to this tribunal would naturally prefer a definite, authoritative statement of the law to the varying records and digests compiled by textbook writers and jurists, no matter how competent and eminent.

The Advisory Committee of Jurists which drafted the Statute of the Permanent Court of International Justice recommended that

I. A new interstate Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible for the purpose of:

1. Reestablishing the existing rules of the Law of Nations, more especially and in the first place, those affected by the events of the recent War;
2. Formulating and approving the modifications and additions rendered necessary or advisable by the War, and by the changes in the conditions of international life following upon this great struggle;
3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy;
4. Giving special consideration to those points which are not, at the present time, adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

II. That the Institute of International Law, the American Institute of International Law, the *Union juridique internationale*, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work.

III. That the new Conference should be called the Conference for the Advancement of International Law.

IV. That this Conference should be followed by periodical similar Conferences, at intervals sufficiently short to enable the work undertaken to be continued, in so far as it may be incomplete, with every prospect of success.<sup>1</sup>

It will be observed that this committee of distinguished jurists did not specifically urge the *codification* of international law. The conference to be called was to be termed "a Conference for the *Advancement* of International Law." Though individual statesmen and jurists were undoubtedly thinking of statutory legislation, which should include not only *accepted* law but also *new* law, the general purpose in mind was the *clarification* of international law.

Without having clearly defined the end in view, the League of Nations, by the Assembly resolution of September 22, 1924, proceeded to appoint a Committee of Experts for "the Progressive Codification of International Law to prepare a provisional list of the subjects of international law, the regulation of which by international agreement would seem to be most desirable and realizable at the present moment." This resolution also states:

The Assembly emphasizes the great immediate practical value in this connection of assembling together in the form of a code, according to a methodical classification, the various general international conventions, *i.e.*, those which are open to acceptance by states in general.

The Committee of Experts in its report of April 23, 1929, made reference to the possibility of "a code to be published of the collective conventions from which rules of international law can be derived." The subjects chosen for study were Nationality, the Law of Territorial Waters, and Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners. The first Conference for the Codification of International Law was held at The Hague from March 13 to April 13, 1930. The results of this conference were a Draft Convention on Nationality, a Protocol on Military Obligations, and two Protocols on Statelessness, submitted for the further consideration of the governments there represented. There was a complete deadlock on the other two subjects.

In the preamble of the resolution of the Assembly of the League of Nations which was adopted October 3, 1930, occurs the following curious vague outline of policy for codification:

<sup>1</sup> *Procès-Verbaux* of the Proceedings of the Committee, The Hague, 1920, pp. 747-748.

That the Assembly decides to continue the work of codification with the object of drawing up conventions which shall place the relations of States on a legal and secure basis without jeopardizing the customary international law which should result progressively from the practice of States and the development of jurisprudence.

Considerable light is thrown upon the divergence of views on this subject in the League of Nations by the alternative resolutions prepared by various groups of nations, notably that of the British, French, German, Italian, and Greek delegations:

It is desirable to recognize a distinction between the gradual formulation and development of customary international law, which should result progressively from the practice of States and the development of international jurisprudence, and the formulation of international conventions by the States, of precise rules, whether derived from customary international law or entirely new in character, to govern particular relations between States the regulation of which by general agreement is found to be of immediate practical importance.

The Assembly considers that the term "codification" as applied to the work of the development of international law undertaken by the League of Nations should be understood as an activity of the last-mentioned character, and that, in present circumstances, as was shown by the experience of the Conference at The Hague, it is not for the League or the conferences convened by it to endeavor to formulate the rules which are binding upon States as part of the customary law of nations.

The resolution proposed by the Norwegian and Swedish delegations stated:

The Assembly is of the opinion that the term "codification" applied to the work of developing international law undertaken by the League of Nations, should be interpreted as meaning the embodiment in a series of international conventions, freely accepted by states, of definite rules, either based on customary international law or being entirely new law, to govern such forms of private inter-State relations as it may seem immediately practical and important to regulate by general agreement.

M. Rolin, of Belgium, offered the following illuminating resolution:

It has been shown by the experience already acquired in this field of the League of Nations that it is hardly practicable to assign as the object of codification conventions the determination of the existing customary law, since new elements must necessarily be introduced in any endeavor of the kind in question; that moreover attempts imprudently undertaken in such a sense involve the risk of enfeebling law which is already in process of formation and of which the consolidation and development may be expected from the progress of international practice and jurisprudence;

That, accordingly, while it is advantageous that documentation regarding international practice and jurisprudence should be brought together for the purpose of the preparation for codification conferences, it will be desirable that henceforth the discussion should be to a greater degree directed towards examination of the value of the rules which it is contemplated to adopt for the future.

The comment of Mr. Costello, representing the Irish Free State in the Council of the League of Nations, concerning the method to be followed in codification is of interest: "The work of codification should be carried on not only by expert jurists, but equally by those who are able to examine with a view to reaching a compromise legal questions and political considerations."

Professor A. Pearce Higgins, of Cambridge University, commented upon the Hague Codification Conference as follows:

The word "codification" has several meanings, and in the sense in which it is understood at The Hague, it meant more than the compilation of a systematic statement of the existing law on the several subjects, which is its ordinary significance. It meant the making of new rules of law, in other words, legislation.<sup>2</sup>

The British Government in its reply to an enquiry sent out by the Secretary-General of the League of Nations under date of January 19, 1931, concerning the program for codification outlined in the resolution of the Assembly previously cited, observed that "the work of The Hague Conference would have been more useful if it had been recognized from the outset that its function was one of legislative codification and not one of consolidatory codification." The French Government, replying to the same enquiry, asserted that "codification should not be directed toward laying down rules which already exist." The Italian Government expressed its doubts concerning further attempts at codification by the League.<sup>3</sup>

We would now seem to be in the position, in the light of what has preceded, to attempt to clarify, if we may, the whole problem of codification and to draw certain conclusions concerning "the advancement of international law" which is the legitimate concern of all who are interested in international polity. We must, however, at the outset recognize that fundamental questions of a controversial character are involved which it would not be possible, within the scope of this article, to present adequately. For example, there is the old controversy concerning the relative merits of "unwritten" and "written" law; concerning the value of "judge-made law"; concerning the Austinian concept of law as a sovereign command enforced through the courts. The attitude which we may take on these various questions must necessarily color our estimate of codification, whether of municipal or of international law. A highly controversial problem which we cannot attempt here to resolve is that of the authority of decisions of the League of Nations as a rule of international law. We may, however, venture to define more clearly what should be the true nature of codification by the League of Nations.

Enough has been shown to demonstrate that codification may be regarded in two lights, namely, either (1) as a kind of authoritative compilation to form a

<sup>2</sup> British Year Book of International Law, 1932, p. 7.

<sup>3</sup> Quoted by Manley O. Hudson in an editorial on "The Prospect for Future Codification" in this JOURNAL, Vol. 26 (1932), p. 137.

digest for the information of statesmen and jurists; or (2) as a process of statutory legislation which has actual binding force on the parties subject to its authority. There would certainly seem to be a substantial unanimity in regarding a code as a convenient *form*, whether prepared by private individuals, such as Dr. Lieber, David Dudley Field in his project of 1881, Bluntschli in 1890, by learned institutes of law or by government authority. The main end always in view would seem to be a concise, logical, orderly restatement of accepted law, whether written or unwritten. Difficulties, however, immediately begin to present themselves when we envisage the enactment of a code either by statutory legislation or through the negotiation of multilateral treaties. It is evident that while there is no unanimity of opinion concerning the *scope* of codification of international law, there is a general realization that the *process* contemplated is one of *legislation*. The purpose is not merely to *state* existing law—what the British Government terms “consolidatory legislation,”—but also to *enact* new law. The task is not one of *compilation* by jurisconsults, as in the Codes of Justinian, but of *legislative enactment*.

Professor P. J. Baker, of the University of London, has admirably stated the distinction between these two functions of codification:

. . . the word codification properly used means the writing down of existing law, . . . the making of new law, either *in vacuo* or by the amendment or development of existing rules, ought to be termed legislation. This need not involve an absolutely rigid adherence to the distinction made. Codification may involve minor changes in the existing law and legislation may include the re-enactment of some parts of the existing law; but broadly the distinction is clear.

This use of the terms is in accordance with the best British opinion. In his discussion of the codification of parts of English law by means of consolidating statutes, Sir Frederick Pollock remarks that “a certain number of *well settled* portions of our general commercial law have been declared in statutory form, *codified* in fact”; and he says further, that the cases decided on the construction of these “codes” have been very few “and of those, almost all have been on questions of principle which the Acts had left open because the existing law left them open.” In other words, the partial “codification” of English law which has been done by means of consolidating statutes, and which Sir Frederick Pollock approved and wished to continue, has been in a very rigid sense the writing down of the existing and accepted law, not the development of new law.

This distinction between codification and legislation is not the less real, nor of less significance, because every code is in fact brought into force by a legislative process. Even if it is no more than the writing down in the strictest sense of existing unwritten or customary law, it becomes “statutory” law only as the result of action by the law-making authority. Similarly, in international law, a new code, even if it embodies nothing but the universally accepted rules of the existing system, could only come into force as a result of a process analogous to that of legislation. In Sir T. E. Holland’s words:

“A written statement of . . . any branch of the law of nations can, of course, become binding only by means of convention; since treaty-making on a large scale is the only substitute for legislation available to a group of independent political communities.”

This point, indeed, illustrates well one aspect of the practical importance of the distinction made between legislation and codification; for an international convention at the best is not a very satisfactory substitute for a legislative process. The point is well put in some words from the same high authority:

"Quasi-legislation by a congress is, strictly speaking, a contract, which binds only those who are parties to it; though, if those parties are numerous and important enough, the moral weight of their formulated opinion is with difficulty resisted in the long run by a dissentient minority of the nations."

It may be taken, therefore, that codification in its strict sense, and in the sense particularly in which it has been used by British writers and by the British Government, means the declaration of existing law. It will be so used in this study, while the word "legislation" will be used to indicate the means by which international law can be amended or added to, and by which new law can be made. Legislation, no doubt, is an inexact term to use in connexion with international law; but, as will be shown later, it is much more exact today than it was when the phrase "quasi-legislation" was first used by Holland in 1876. In its broad sense it conveys the right meaning, for the operations described later on as legislative are the processes which, in international society, properly correspond to legislation in a national State.

In codification, used in this narrow sense, and considered as a practical legal process, there are two essential points which differentiate it from legislation; the *purpose* with which it is undertaken and the *method* by which it is carried through.

The purpose of codification is of course to improve, not the substance, but the form of the law; to make its rules easier to understand and to apply, not to alter the rules themselves. It is to improve the form of the law by getting rid of apparent ambiguities or conflicts, by bringing customary law and statutory law together into one coherent and consistent whole, and thus to clarify the obligations of the subjects of the law without adding to or diminishing those obligations.

The method of codification is likewise quite different from that of legislation, in that it is necessarily a work for professional lawyers alone. It can only be carried through by the intensive study by commissions of lawyers of existing rules, statutes, custom, practice, decisions of courts, etc. On the basis of such study the lawyers reduce their conclusions to writing for the acceptance of the law-making authority in substitution for the existing law. All the consolidating statutes in British legal history have been so drawn up. It is a work which, in Pollock's words, can only usefully be carried out by "proceeding with the utmost caution and employing the very best learning and skill that can be secured." It is the same method of a lawyer's commission leading up to international conferences of lawyers which Oppenheim had in view in advocating before the war the codification of parts of international law. It is again the same process which is proposed in the Resolution of the Jurists' Committee quoted above, except that as preparatory commissions they propose to use the existing academic Institutes of International Law.<sup>4</sup>

The late Professor Theodore S. Woolsey, of Yale University, after defining codification as "the reducing of its unwritten case law to statutory form," goes on to say that:

This in the matter of international law is impossible, because no authority is empowered to enact statutes to cover it. What then in international law is the equivalent of statutory enactment? Clearly it is the general acceptance by States under treaty. Such a process consists of two parts; the scientific determination of the law as it is and as it should be, and the public universal acceptance of the law as it shall be, as some-

<sup>4</sup> British Year Book of International Law, 1924, pp. 41-44.

thing by which each State consents to be bound. The first process is academic, scholarly: the second process is political.<sup>5</sup>

It is clear, then, that codification by means of international conferences, or more specifically by means of multilateral conventions, is distinctively a legislative and a political process. We need not enter here into a discussion of the juridical binding value of legislation of this nature. What is of immediate interest is the question whether such legislative enactment is a desirable process. The following comments by distinguished jurists may serve to throw light on the right answer to this question.

Justice Cardozo, of the United States Supreme Court, in his lectures before the Law School at Yale University in 1923 on the subject "The Growth of Law," stated:

*Stare decisis* is not in the constitution, but I should be half ready to put it there, and to add thereto the requirement of mechanical and literal reproduction, if only it were true that legislation is a sufficient agency of growth. The centuries, if they have proved anything, have proved the need of something more. These tentative and uncertain gropings may be deplored, but they are inevitable, none the less, if we are not to rush blindly into darkness. Unique situations can never have their answers ready made as in the complete letter-writing guides or the manuals of the art of conversation. Justice is not to be taken by storm. She is to be wooed by slow advances. Substitute statute for decision, and you shift the center of authority, but add no quota of inspired wisdom. If legislation is to take the place of the creative action of the courts, a legislative committee must stand back of us at every session, a sort of supercourt itself. No guarantee is given us that a choice thus made will be wiser than our own, yet its form will give it a rigidity that will make retreat or compromise impossible. We shall be exchanging a process of trial and error at the hands of judges who make it the business of their lives for a process of trial and error at the hands of a legislative committee who will give it such spare moments as they can find amid multifarious demands. Even if we could believe that the amateurs would be wiser than the professionals, their remedy would be prescribed too late to help the patient whose disease they had observed. Administered to another, without reckoning a change of symptoms, it might do more harm than good. I do not mean to depreciate unduly the value of the statute as an instrument of reform. Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions, familiar to the judicial process. Legislation, too, can sum up at times and simplify the conclusions reached by courts, and give them new validity. Even then, its relief is provisional and temporary. The cycle is unending. "Code is followed by commentary, and commentary by revision, and thus the task is never done."<sup>6</sup>

The following excerpts from *Law: Its Origin, Growth and Function*, by James Coolidge Carter, late member of the New York Bar, are pertinent and forceful:

(1) Law begins as the product of the automatic action of society, and becomes in time a cause of the continued growth and perfection of society. Society cannot exist without it, or exist without producing it. Ubi societas ibi lex. Law, therefore, is self-created and self-existent. It is the form in which human conduct,—that is, human life, presents

<sup>5</sup> This JOURNAL, Vol. 16 (1922), p. 423.

<sup>6</sup> The Growth of the Law, p. 132.

itself under the necessary operation of the causes which govern conduct. It is the fruit of the myriads of concurring judgments of all the members of society pronounced after a study of the consequences of conduct touching what conduct should be followed and what should be avoided.

(2) Inasmuch as conduct is necessarily controlled by previous thought, and such thought is determined by individual constitution, that is, character, and the environment, nothing can directly control conduct, which cannot control both character and environment. It is not, therefore, possible to *make law* by legislative action.

In his comments on the Report of David Dudley Field advocating a Civil Code for New York State, Mr. Carter observes:

The propositions embraced in this Report are substantially these:

First: Whatever is clearly *known*, can be clearly *stated in writing*, and therefore, all that is clearly known of law can be clearly stated in writing;

Second: A Code therefore is practicable, for a Code is but the simple and orderly statement in writing of all we know of the law;

Third: It is true that we cannot foresee what the law would be for new cases, that is, for new groupings of fact arising in the future, but we are not obliged to lay it down for such cases, and should not attempt to lay it down in a Code.

Fourth: The benefits which would be derived from a codification of the law would be very great in number and variety; the law would be rendered much more clear and certain, and instead of necessitating a search through a library of books, could be found in a single volume, and the ordinary layman could obtain that knowledge of its rules to which every one is entitled who is bound by them.

This reasoning, if such it may be called, contains nearly every form of error. The first proposition is a mere truism. Who has ever doubted the possibility or expediency of reducing our knowledge of the law, as of everything else, to writing? It completely justifies, were justification needed, the very thing we have been doing ever since law came to be thought of, by our digests and treatises which are reductions of all we know of the law to writing, but it justifies nothing more. The second proposition would be true if *stating* law in writing and *enacting* law in writing were the same thing, but things more different from each other could scarcely be imagined. *Stating* law is the scientific work of putting into orderly form those customary rules of conduct which men in society have come to observe, and requires scientific knowledge in any one undertaking the task. *Enacting* law is the giving of a *command* such as a superior gives to an inferior, and does not absolutely require any knowledge at all in him who gives it, and such commands are in fact often given by those who have no, or little, knowledge or whose knowledge is of a kind not at all desirable. *Stating* a rule of the common unwritten law is putting into words a rule by which all conduct of the kind described may, so far as the past enables us to determine, be governed consistently with the sense of justice, but which future experience may require to be restricted, amended, or enlarged. *Enacting* a rule of the common law is *making* an absolute rule by which all such conduct *must* be governed, regardless of the sense of justice.

Well may the advocates of codification shrink from a task which sheer presumption only would assume when the nature of it is fully understood; for, disguise it as they may, the task is to frame rules which the unknown conduct of the future will follow and obey. This necessarily supposes that the legislator can compel the members of society to act with uniformity in obedience to his dictates, in other words, that there is or can be a human sovereign able to do, as Austin and Maine say, "exactly as he pleases." The

attempt, whenever made, will prove as futile and miserable as the effort of the scenic artist to mimic the thunder of Jove.

*Demens qui nimbos et non imitabile fulmen  
... simularet.*

I dismiss the topic of codification with the conviction that so far as it is a scheme for the conversion of the unwritten into written law because of a supposed superiority of the latter, it is entirely inconsistent with the fundamental principles of law. The peculiar condition which has sometimes obtained and may hereafter obtain, where different political societies with different original customs are struggling for unity may justify a limited reduction of conflicting usages by a codifying statute. But when any such attempt is made the true nature of law will re-assert itself. A judiciary law will grow up around the code and will eventually replace the written enactment and the law actually administered will be that which conforms to the customs of men.

Oppenheim, the great English publicist on international law, in a thorough discussion of the whole problem of codification, observes, *inter alia*:

Codification certainly interferes with the so-called organic growth of the law through usage into custom. It is true that a law, once codified, cannot so easily adapt itself to the individual merits of particular cases which come under it. It is further a fact which cannot be denied, that together with codification there frequently enters into courts of justice, and into the area of juridical literature, a hair-splitting tendency, and an interpretation of the law, which often clings more to the letter and the word of the law than to its spirit and its principles. And it is not at all a fact that codification does away with controversies altogether. Codification certainly clears up many questions of law which have been hitherto debatable, but it creates at the same time new controversies. And, lastly, all jurists know very well that the art of legislation is still in its infancy and not at all highly developed. The hands of legislators are very often clumsy, and legislation often does more harm than good.

But is the law of nations ripe for codification? I readily admit that there are certain parts of that law which would offer the greatest difficulty and which therefore had better remain untouched for the present. But there are other parts, and I think that they constitute the greater portion of the law of nations, which are certainly ripe for codification. There can be no doubt that, whatever can be said against codification of the whole of the law of nations, partial codification is possible and comparatively easy. The work done by the Institute of International Law, and published in the *Annuaire de l'Institut de Droit International*, gives evidence of it. And the number and importance of the law-making treaties produced by the Hague Peace Conferences and the Declaration of London resulting from the Naval Conference of London, 1908-1909 (though the latter has not been ratified), should leave no doubt as to the feasibility of such partial codification.

However, although possible, codification could hardly be realized at once. The difficulties, though not insuperable, are so great that it would take the work of perhaps a generation of able jurists to prepare draft codes for those parts of International Law which may be considered ripe for codification. The only way in which such draft codes could be prepared consists in the appointment on the part of the Powers of an international committee composed of a sufficient number of able jurists, whose task would be the preparation of the drafts. Public opinion of the whole civilised world would, I am sure, watch the work of these men with the greatest interest, and the Parliaments of the civilised States would gladly vote the comparatively small sums of money necessary for

the costs of the work. But in proposing codification it is necessary to emphasise that it does not necessarily involve a reconstruction of the present international order and a recasting of the whole system of International Law as it at present stands. Naturally, a codification would in many points mean not only an addition to the rules at present recognised, but also the repeal, alteration, and reconstruction of some of these rules. Yet, however this may be, I do not believe that a codification ought to be, or could be, undertaken which would revolutionise the present international order and put the whole system of International Law on a new basis. The codification which I have in view is one that would embody the existing rules of International Law together with such modifications and additions as are necessitated by the conditions of the age and the very fact of codification being taken in hand. If International Law, as at present recognised, is once codified, nothing prevents reformers from making proposals which could be realised by successive codifications.<sup>7</sup>

Bluntschli, in the introduction to his own magistral attempt at the codification of international law, commenting on the labors of Francis Lieber, David Dudley Field, and other attempts at codification, observes:

Le contenu de ces travaux scientifiques ne diffère pas au fond de celui des codes; on y formule le droit en vigueur. Mais comme ils sont l'oeuvre de simples citoyens, et que les codes sont par contre l'oeuvre de l'état, ils ne peuvent prétendre à être respectés au même titre que les lois. Ils n'ont d'autre autorité que celle de la science, et pour autant qu'ils sont conformes à la vérité et à la justice. Ces travaux ont donc une autorité morale, interne, soumise à la critique de tous les temps, libre avant tout, et non point cette autorité inattaquable, soutenu par des forces extérieures, et qui est le propre des lois.<sup>8</sup>

Au fond, le droit international est l'oeuvre de la science; c'est elle qui a réveillé dans le monde civilisé le sentiment si longtemps assoupi des droits de l'humanité. Les hommes d'état entreprirent de cultiver et de développer le droit international. Encore aujourd'hui nous voyons agir ces deux forces, les hommes de science et les hommes d'état. Tantôt c'est la science qui marche en avant, a mesure qu'elle développe les principes du droit international; tantôt elle est à la remorque des hommes d'état, lorsque ceux-ci, entraînés par le courant de l'opinion publique, se décident à appliquer des idées conformes aux besoins du temps. Lorsque la science réussit à formuler clairement une idée, à l'exprimer sous forme de principe juridique, et qu'ensuite les diverses puissances commencent à observer ce principe, alors se forme le droit international, lors même qu'il ne serait pas reconnu partout, ou que son exécution ne pourrait pas toujours être obtenue. Malgré l'absence d'un corps faisant des lois pour l'humanité entière, malgré l'absence de tribunaux internationaux, on n'en constate pas moins un développement successif du droit international, chaque fois qu'un état ou un peuple important réussissent à faire reconnaître et respecter dans la pratique certains droits ou devoirs internationaux.<sup>9</sup>

The views which have been quoted in the course of this article, whether directed to the codification of municipal law or the codification of international law, support in the main the contention that the restatement and revision of international law by legislative enactment through treaty agreements is a most dubious and defective method. The practical lessons learned from the Codification Conference of 1930 at The Hague forcibly confirm this conclusion.

<sup>7</sup> Oppenheim's International Law, 4th ed., Vol. I, pp. 49-51.

<sup>8</sup> *Le Droit International Codifié*, p. 6.

<sup>9</sup> *Id.*, p. 17.

This conference was composed of official representatives of governments intent on maintaining special points of view dictated largely by the exigencies of diverse political philosophies and special considerations. Discussion turned not so much on the requirements of a rational, coherent system of international law, or on a scientific approach to specific problems. The atmosphere of the conference was diplomatic and political, not juristic.

Can any good come out of such a procedure? In so far as concerns the existing law of nations, the answer would seem to be decidedly in the negative. It is most undesirable to invite controversy concerning principles and rules of international law which are gradually emerging out of the necessities and the practice of international society and which bid fair to win acceptance through judicial decisions and the opinions of jurists. The Great Powers, as has already been indicated, seem agreed that there shall be no disputatious discussions concerning existing law. With respect to the making of new law, the dangers of unscientific statutory legislation and of the possibilities of creating fresh controversies would appear obvious. The cautious proposal contained in the resolution of the Assembly of the League of Nations of October 3, 1930, "to continue the work of codification with the object of drawing up conventions which shall place the relations of States on a legal and secure basis without jeopardizing the customary international law which should result progressively from the practice of States and the development of jurisprudence," suggests a confusion of aims as well as the realization of the perils of codification. The statement that "The Assembly emphasizes the great immediate practical value in this connection of assembling together in the form of a code, according to a methodical classification, the various general international conventions, *i.e.*, those which are open to acceptance by states in general," is nothing short of amazing. If by this is intended to include all such conventions as the Universal Postal Union Convention, International Labor Conventions, Sanitary, Transit, and other diverse international agreements negotiated under the League of Nations, the labor of classification and compilation would be of a stupendous magnitude far exceeding the compilation of national statutes. Furthermore, it would be a manifest absurdity to claim that conventions governing such matters as transit and communications, obscene publications, and the opium traffic are an integral part of international common law. Such agreements are of a notoriously opportunistic nature, dictated by changing circumstances and subject to constant revision or abrogation. They have only the most exiguous relation to the customary law of nations.

From whatever angle we may approach this problem of codification, we seem compelled to recognize that the whole process of the *enactment* of international law through treaty agreements is utterly unsuitable and impractical.

If it be conceded that the progressive codification of international law by treaty enactment is unsuitable, undesirable, and impractical, we should not find it difficult to agree on the procedure which would seem indicated by reason of the nature of international law and the logic of experience. Recognizing

that the customary law of nations is an orderly, coherent system of basic, primordial principles and practical rules which have arisen out of the necessities of international society; that its authority is not superimposed by sovereign command but rests on the free consent of nations, we may insist that the "advancement of international law" so ardently desired should be along the lines already laid down. What are these lines? They may be summed up in the practice of nations as evidenced in the opinions of juriconsults, state documents, court decisions—both municipal and international,—and in the negotiation of treaties embodying principles and rules of international customary law. Treaties themselves do not *ipso facto* create international law: they apply only between the signatories. But they may so reflect the accepted practice of nations that such principles and rules may be said to have become embodied in the international common law, as, for example, in the case of treaties of extradition. George Grafton Wilson has admirably stated this truth:

The reappearance of the same clause in a large number of treaties between two or a few states may indicate the existing law for all, and indicate the existing law for the states parties to the treaties. When the various clauses appear in treaties made between several different states at considerable intervals of time, it is usual to draw the same conclusions in regard to their general application.<sup>10</sup>

The great English publicist Hall adds in this connection:

While, therefore, treaties are usually allied with a change of law, they have no power to turn controverted into authoritative doctrine, and they have but little independent effect in hastening the moment at which the alteration is accomplished.<sup>11</sup>

It would seem evident, therefore, that the true object of codification, namely, the orderly, logical classification and compilation of existing law as an authoritative statement of international common law, should be to amass the *evidence* of the accepted practice of nations and to indicate at the same time the principles and rules in actual process of acceptance. What then should be the next step in codification? Certainly not in further diplomatic and political conferences. The right and the logical procedure indicated would seem clearly to be that embodied in the second recommendation of the Advisory Committee of Jurists, barring, naturally, the provision for another conference:

That the Institute of International Law, the American Institute of International Law, the *Union juridique internationale*, the International Law Association and the Iberian Institute of Comparative Law, should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the Governments, and then to the Conference, for the realization of this work.

<sup>10</sup> International Law, p. 11.

<sup>11</sup> International Law, 8th ed., p. 12.

This recommendation is entirely in harmony with the practice of nations since the earliest times. The Greeks and the Romans depended in the first instance on their jurisconsults rather than on official edicts for an authoritative statement of the law. Administrative officials and judges alike have ever been wont to turn to the learned experts in jurisprudence whose opinions are often cited in decisions of the courts and in state documents. The League of Nations employed this method in dealing with the question of the Aaland Islands and with the Corfu incident. The advantages of this procedure are fairly obvious. Men versed in the law as a science may be depended on to be impartial. They are not interested in mere litigation. They are not *partis pris*. They have no concern how their opinions may operate in a specific instance. They care not for the arbitrary and extraordinary provisions of shifting legislative enactments. They do not presume to usurp either the functions of the legislator or of the judge. They desire to *state* the law, not to enact law. They respect the freedom of the judge to apply the law according to varying facts and factors in every fresh case. They do not wish to have the law crystallized and stereotyped in formal rigid moulds. They know that law is a living, growing body, assimilating new elements and eliminating useless elements as it adjusts itself to changing sociological conditions. They are not the slaves of precedents and fictions that do not serve the logical and healthy development of the law. They are impatient of the technicalities of the law courts and of the hair-splitting tendencies of the legal practitioner. They realize with the great English jurist Hall that "there is no place for the refinements of the courts in the rough jurisprudence of nations." They realize that the slow and chaotic development of international society demands the most cautious, liberal, rational, and elevated conception of the rôle of international law as a reasonable, consistent body of principles and rules arising out of the very necessities of international intercourse. They see the immense dangers of any attempt to impose on nations any rigid, dogmatic system of statutory or treaty-made law. In sum, it is to the scholarly jurists steeped in the science of jurisprudence and freed from nationalistic and legalistic fetters that we must turn for the real advancement of international law.

The contributions already made by various publicists, by groups of jurists, and by learned societies are of inestimable value, notably by the *Institut de Droit International*, the American Institute of International Law and the International Law Association. Special mention should be made of the valuable contribution to the better understanding of the practice of nations by the Harvard Research in International Law which for years has been engaged in gathering all available evidence of international customary law in the special fields designated by the League of Nations for the Codification Conference. No more thorough work of this kind has probably been accomplished by any other similar group of scholars.

It would be difficult to estimate adequately the practical and the profound influence of the *Institut de Droit International* on the actual practice of na-

tions and on the evolution of international law as a rational, orderly system adapting itself to the changing needs of a new international order. Its pronouncements have been cited authoritatively in chancelleries and courts as well as by publicists. Composed of jurists representing diverse systems of politics and jurisprudence, the *Institut* is peculiarly adapted to meet the present insistent and urgent demand for the clarification of international law. Its resolutions concerning various fields of the law of nations, while not claiming to be a code, amount virtually to an authoritative statement of international practice and furnish valuable evidence of the emergence of new principles and rules demanded by the necessities of international intercourse. If the League of Nations should find it impractical to undertake this gigantic work of "progressive codification," it might not do better than to request the *Institut de Droit International* officially to assume the task of the restatement of international customary law and of recommending the acceptance of those new principles and rules which may be in process of evolution, *necessitas juris*. What would be more reasonable and more promising of fruitful results than that the League should request the *Institut* to designate a commission of competent jurists to devote their entire time to this monumental task? Their findings, published from time to time under the imprimatur of the League of Nations, while not requiring the formal approval of governments, might serve as an authoritative guide to statesmen and judges. Though lacking the coercive, and at the same time, the defective value of legislative or treaty enactments, they might exercise a compelling influence of a more effective and constructive nature. Without prejudicing the function of judicial interpretation in the evolution of international law, the views of such a commission of international jurists might aid mightily in enabling judges to reach conclusions which would facilitate the sound evolution of the law of nations. In sum, we would thus have eventually a scientific statement of the law, a compilation, a suitable digest, a virtual code comparable in value to the monumental labors of those great jurisconsults who at the behest of Justinian rendered such memorable service to the cause of universal jurisprudence.

## CONDITIONS OF WITHDRAWAL FROM THE LEAGUE OF NATIONS

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Notices of withdrawal from the League of Nations during the year 1933 on the part of two States permanently represented on the Council, Japan and Germany, have turned attention once more to the provision for withdrawal in the Covenant of the League and to the necessity for interpretation of the scope and meaning of that provision.

Paragraph 3 of Article 1 of the Covenant states:

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.<sup>1</sup>

This text raises the following questions: How and why was this provision inserted in the Covenant? What constitute "international obligations and obligations under this Covenant"? Who is to determine their fulfillment?

### THE ADOPTION OF THE WITHDRAWAL CLAUSE

The draft Covenant of February 14, 1919, which President Wilson brought back with him to the United States after his first trip to Paris subsequent to the war, contained no such provision for withdrawal.<sup>2</sup> Among the criticisms launched against that document, one of the most vehement was in regard to the omission from it of such a provision. Senator Knox voiced this criticism in a speech in the Senate on March 1, 1919, when he asserted that the term "league" was misleading since that term connoted a confederation which implied a right in the members to withdraw at their will: "But there is no right of secession within the four corners of this Covenant. On the other hand, the association here provided for is a union in the full sense of that term as applied to our own political institutions. Once in this union and we remain there no matter how onerous its gigantic burdens may become."<sup>3</sup> Senator Hitchcock, leader of the Democratic forces in the Senate at that time, submitted to President Wilson when he was returning to Paris, a number of suggestions for changes in the draft Covenant of February 14th, intended to satisfy Ameri-

<sup>1</sup> Another method of withdrawal, provided in Art. 26 on the ratification of amendments, has not been resorted to. Paragraph 2 of that article states: "No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League."

<sup>2</sup> D. H. Miller, *The Drafting of the Covenant* (1928), II, p. 327.

<sup>3</sup> 57 Congressional Record, 65th Cong., 3rd Sess., p. 4688.

can demands; among them was—"some provision by which a member of the League can, on proper notice, withdraw from membership."<sup>4</sup> President Wilson discussed the matter with Lord Cecil; though both expected that France would be much opposed to a withdrawal clause, President Wilson indicated that the Covenant would not be acceptable to the United States unless it contained a specific provision for withdrawal. At the thirteenth meeting of the Commission on the League of Nations, he introduced the following withdrawal amendment:

After the expiration of ten years from the ratification of the Treaty of Peace of which this Covenant forms a part, any State a member of the League may, after giving one year's notice of its intention, withdraw from the League, provided all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.<sup>5</sup>

Discussion of this amendment centered around the time element in the withdrawal provision. Apparently there was no discussion of the second part of the provision as to what was meant by "international obligations and obligations under this Covenant," nor of its relation to the provisions of Articles 10, 12, 13, 15 and 16. The French objection, voiced by M. Larnaude, was not to the right of withdrawal itself, but to the ten-year period preliminary to the exercise of that right, which, it was feared, would have a bad psychological effect on League members; such a period would be regarded as a trial period of ten years, at the end of which time the League might easily break up.<sup>6</sup> M. Bourgeois, therefore, urged that the definite time limit should be eliminated. Discussion on this point finally resulted in the adoption of a withdrawal clause very similar to the present paragraph 3 of Article 1 of the Covenant.<sup>7</sup> No effort was made by the Commission to interpret the second part of the withdrawal provision, nor to designate which organ or organs of the League should determine whether a State which had signified intention to withdraw, had fulfilled its obligations within the meaning of the provision.

M. Ray maintains that if Article 1, paragraph 3, had mentioned only the fulfillment of international obligations in general, such a provision would have been superfluous. In his view, the force of the provision resides in the phrase—"and all its obligations under this Covenant."<sup>8</sup> M. Ray's statement on this point may be questioned. It is true that "all its international obligations" does not add anything to the substance of a League member's general international obligations which it, in common with all other States of the world, is expected to observe in accordance with international law. Such obligations would be as binding after a State's withdrawal from the League as before.<sup>9</sup> However, the provision that a member of the League may, after proper notice, withdraw from the League, provided that all its international obligations as

<sup>4</sup> Miller, *op. cit.*, I, p. 277.    <sup>5</sup> *Idem*, p. 342.    <sup>6</sup> *Idem*, p. 342.    <sup>7</sup> *Idem*, pp. 347-348.

<sup>8</sup> Jean Ray, *Commentaire du Pacte de la Société des Nations* (1930), p. 111.

<sup>9</sup> Cf. C. G. Fenwick, this JOURNAL, Vol. 27 (1933), p. 517.

well as its obligations under the Covenant are fulfilled at the time of its withdrawal, provides a sanction to be used by the League against a member which has given notice of intention to withdraw but has not fulfilled its international obligations. This specific inclusion of "international obligations" makes the observance of those obligations more difficult for League members to evade by reason of the added emphasis which the Covenant places upon such observance. That the Covenant should have attempted to make more effective the observance of all international obligations by League members is consistent with the avowed aims of the organization as expressed in its preamble, in particular the maintenance of a scrupulous respect for treaties and the observance of international law.<sup>10</sup>

Indeed the importance and vitality of Article 1, paragraph 3, will be determined by the effectiveness of the sanction, not yet tested, to be employed against the State which attempts to escape its obligations by merely withdrawing from the League. Such withdrawal action followed by the League's proper use of its power under Article 1, paragraph 3, would serve to brand the withdrawing State, before the public opinion of the world, as a State which had deliberately violated its obligations. Furthermore, in accordance with Article 1, paragraph 3, the League organs, by exercising such power, would retain jurisdiction in regard to the withdrawing State's membership even after the two-years' notice of withdrawal had elapsed.

#### MEANING OF THE PROVISION

What is meant by the provision that "all its obligations under this Covenant" shall have been fulfilled at the time of a member's withdrawal? All its obligations would appear to include not merely the paying of contributions, the registering of treaties, and other obligations of that nature, but also the observance of certain fundamental commitments under Articles 10, 12, 13 and 15. Such an interpretation is suggested by M. Bourgeois' comment on the withdrawal clause at the time it was being discussed by the Commission on March 26, 1919, to the effect that the clause should also "ensure that states might not do so [withdraw] except on terms that would not damage the League."<sup>11</sup>

In any attempt to interpret the withdrawal clause, account must also be taken of the expulsion clause embodied in paragraph 4 of Article 16 of the Covenant which states:

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote

<sup>10</sup> In commenting on the words "all its international obligations and all its obligations under this Covenant," Schücking and Wehberg simply accept them as obligations which must be fulfilled. "According to the words as they stand it is of no importance whether these obligations stand in immediate connection with the League of Nations." Translated from W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes*, 3rd ed. (1931), Vol. I, p. 373.

<sup>11</sup> Miller, *op. cit.*, I, p. 346.

of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

In other words, paragraph 3 of Article 1 provides that a State may withdraw after two years' notice of its intention so to do, provided that all its international obligations and all its obligations under the Covenant have been fulfilled at the time of its withdrawal, while paragraph 4 of Article 16 provides for expulsion from the League of a member which has violated any covenant of the League.

In point of time the expulsion clause came later than the withdrawal clause. The latter was adopted at the thirteenth meeting of the Commission on the League of Nations on March 26, 1919.<sup>12</sup> On the same day a Drafting Committee was appointed by the Commission to recast the text of the February 14th draft of the Covenant, giving due consideration to the changes agreed upon by President Wilson and Lord Cecil on March 18, 1919, the discussions of the Commission, and the views of the members of the Committee.<sup>13</sup> The Drafting Committee did more than recast, and its final draft contained an entirely new provision for expulsion from the League, as paragraph 4 of Article 16. No explanatory comment with regard to it seems to have been made. It was referred to in a "Note by the British Delegation on the Redraft Submitted by the Drafting Committee" to this effect: "A new final paragraph has been inserted to meet the case of a State which after breaking its Covenant still claims to vote on the Council or in the Assembly."<sup>14</sup>

An interpretation of the expulsion clause was made in a report submitted by the Secretary-General to the Council on March 9, 1927, on the "Legal Position of States which do not pay their contributions to the League."<sup>15</sup> The report stated that although there was no specific provision in the Covenant providing a sanction for the non-payment of contributions, paragraph 4 of Article 16 was applicable, but that it would seem preferable not to apply it, except in most extreme cases.

It does not appear reasonably open to doubt that the financial obligation assumed by a Member of the League under Article 6 is one of the covenants of the League and that the last paragraph of Article 16 applies formally to violation of this covenant no less than to violation of the more fundamental obligations of the Covenant. . . .

It is true that the principal object of the paragraph may be considered to be to furnish a sanction, and to protect the League, in the case of breach of one of the fundamental political obligations.<sup>16</sup>

These statements indicate the scope of the provisions in paragraph 4 of Article 16.

There has been no such interpretation of Article 1, paragraph 3; but it would seem that the phrase in that paragraph—"and all its obligations under this

<sup>12</sup> *Idem*, pp. 338; 347-348.

<sup>13</sup> *Idem*, p. 351.

<sup>14</sup> *Idem*, p. 417.

<sup>15</sup> League of Nations Official Journal, 1927, pp. 505-508.

<sup>16</sup> *Ibid.*, p. 507.

Covenant" should be taken to cover the same wide scope of fundamental obligations under the Covenant as does paragraph 4 of Article 16. The apparent paradox in these provisions may be explained as an effort on the part of the framers of the Covenant to provide, on the one hand, a means of voluntary withdrawal under Article 1, paragraph 3 and, on the other, a means of involuntary dismissal under Article 16, paragraph 4, the final judgment in both cases to rest with the League organs and to be determined ultimately by the fulfillment or non-fulfillment of obligations under the Covenant.

#### WITHDRAWAL ACTION UNDER ARTICLE 1, PARAGRAPH 3

The withdrawal clause has been invoked by Costa Rica, Spain, and Brazil, but its provisions have not been elucidated because the circumstances under which resort was had to that clause by these States did not necessitate its interpretation. Costa Rica signified its intention to withdraw in a letter to the Secretary-General of the League, of December 24, 1924, in which was enclosed a check to cover payment of contributions due from Costa Rica as a member of the League of Nations, 1921-22, 1923-1924.<sup>17</sup> The Costa Rican Government was disaffected by Assembly resolutions authorizing the Secretary-General to make urgent representations to certain Latin American countries in respect of their contributions in arrears.<sup>18</sup> The Sixth Assembly expressed its regret at Costa Rica's intention of withdrawing and its hope that that Government might again find it possible to cooperate with the League.<sup>19</sup> In this case there was no question of international obligations or obligations under the Covenant, since the only possibility of applying that part of the provision would have been in case Costa Rica had not paid her contributions in arrears. On March 9, 1928, the Council decided to communicate with Costa Rica, whose time limit had expired over a year previously, and express to that Government the great pleasure that would be felt by the League should Costa Rica again become a member.<sup>20</sup> Costa Rica responded to the Council's letter with a request to be informed as to the interpretation placed by the League on the Monroe Doctrine and the scope given that doctrine when it was included in Article 21 of the League Covenant, before it should decide to accept the Council's invitation to return.<sup>21</sup> That request might be interpreted to indicate that Costa Rica's original reason for quitting the League was probably, as Mr. Morley has suggested, more fundamental than mere disaffection because of the Assembly resolutions calling for payment of contributions in arrears.<sup>22</sup>

Dissatisfaction on the part of Brazil and of Spain with the reorganization of the Council on the occasion of the consideration of Germany's entrance into the League in 1926, led these two States to give notice of their intention to

<sup>17</sup> League of Nations, Monthly Summary, 1925, V, 5, p. 8.

<sup>18</sup> Fifth Assembly, 1924, Plenary Meetings, resolution to that effect, p. 168.

<sup>19</sup> Sixth Assembly, 1925, Plenary Meetings, p. 110.

<sup>20</sup> Official Journal, 1928, p. 432.

<sup>21</sup> *Ibid.*, pp. 1606-1607.

<sup>22</sup> See Felix Morley, *The Society of Nations* (1932), pp. 329-330.

withdraw from the League.<sup>23</sup> No question was raised as to the fulfillment by these States of international obligations or of obligations under the Covenant. Letters addressed to Brazil and to Spain by the Council on March 9, 1928, requested them to reconsider the notices of withdrawal before they should become effective, and extended to each of them a cordial invitation to return and participate in the work of the League.<sup>24</sup> Brazil responded to the Council's communication by stating that no determining factor had altered its decision to withdraw.<sup>25</sup> Spain, however, decided to cancel the notice of withdrawal.<sup>26</sup>

In none of the above cases of withdrawal or notice of intention to withdraw from the League did the application of Article 1, paragraph 3, necessitate an interpretation of the latter part of that paragraph. In contrast to these cases, the recent Japanese notice of withdrawal has raised a number of interesting questions with regard to the interpretation of the withdrawal provision.

#### JAPAN'S NOTICE OF WITHDRAWAL

On February 24, 1933, the Assembly of the League of Nations consummated its efforts to solve the Sino-Japanese conflict in the Far East by the adoption, under paragraph 4 of Article 15, of a most important report. This report was adopted unanimously except for the negative vote of Japan.<sup>27</sup> Part III of the Assembly report is entitled "Chief Characteristics of the Dispute" and in that section are set forth some significant statements which disclose the opinion of the Assembly with respect to the existence of and the fulfillment or non-fulfillment of the obligations under the Covenant, of the parties to the dispute. It is said that both China and Japan had legitimate grievances against each other in Manchuria before September 18, 1931, Japan exercising rights open to question and China placing obstacles in the way of Japan's exercise of certain rights which were not open to contest. Further, it is stated, that, although on the night of September 18, 1931, the Japanese officers near Mukden may have believed that they were acting in self-defence, the Assembly could not consider the other military operations performed by the Japanese at Mukden and in other places in Manchuria, on the same night, as measures of self-defence. "Nor can the military measures of Japan as a whole, developed in the course of the dispute, be regarded as measures of self-defence. Moreover, the adoption of measures of self-defence does not exempt a State from complying with the provisions of Article 12 of the Covenant."<sup>28</sup>

An acknowledgment of the extraordinary features of the case was noted in this section of the report, and then, by way of conclusion in estimating the chief characteristics of the dispute:

<sup>23</sup> Speech by Brazilian representative on the Council, Official Journal, 1926, pp. 887-889; telegram from Brazilian Government forwarded to Council, June 10, 1926, p. 1003 *et seq.*; also, notification by the Spanish Government, Sept. 8, 1926, Official Journal, 1926, p. 1528.

<sup>24</sup> Official Journal, 1928, pp. 584-585.

<sup>25</sup> *Ibid.*, p. 778.

<sup>26</sup> *Ibid.*, p. 603.

<sup>27</sup> Official Journal, 1933, Special Supplement No. 112, p. 22. Siam abstained from voting.

<sup>28</sup> *Ibid.*, p. 72. (Document A [Extr.] 22, 1933, VII, p. 17.) See also M. O. Hudson, *The Verdict of the League: China and Japan (1933)*, p. 19 *et seq.*

. . . It is, however, indisputable, that, without any declaration of war, a large part of Chinese territory has been forcibly seized and occupied by Japanese troops and that, in consequence of this operation, it has been separated from and declared independent of the rest of China.

It should be pointed out in connection with these events that, under Article 10 of the Covenant, the Members of the League undertake to respect the territorial integrity and existing political independence of all Members of the League.

Lastly, under Article 12 of the Covenant, the Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council.

While at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to lie on one side and the other, no question of Chinese responsibility can arise for the development of events since September 18th, 1931.<sup>29</sup>

The final section of the report embodies a statement of recommendations suggested by the Assembly as just and proper. In making these recommendations the Assembly decided to follow certain principles, most important of which were the observance of the provisions of the Covenant, the Pact of Paris, and the Nine-Power Treaty of Washington. The specific recommendations for the settlement of the dispute included: evacuation of the Japanese troops outside the zone of the South Manchuria Railway, the organization of an autonomous Manchuria under the sovereignty of China, negotiations between China and Japan with the assistance of a committee set up by the Assembly.<sup>30</sup>

The Japanese representatives voted against the report of the Assembly, and on March 27, 1933, the Japanese Government notified the Secretary-General of its intention to withdraw from the League of Nations.<sup>31</sup> Japan stated that the members of the League had failed to grasp the realities of the situation in the Far East, or else to face them and treat them accordingly. The Japanese Government further pointed out that, because of the fundamental divergence in opinion between Japan and the members of the League with respect to their interpretation of the Covenant and of other treaties, the Government had come to realize the existence of an irreconcilable difference in views between Japan and the League on policies of peace, particularly with regard to the principles which the members of the League considered should be followed in order to establish a lasting peace in the Far East. Japan considered that under such circumstances further coöperation between itself and the League of Nations was impossible, and gave notice of its intention to exercise its privilege of withdrawal under Article 1, paragraph 3, of the Covenant.<sup>32</sup>

Neither the Council nor the Assembly has made any direct statement with regard to Japan's fulfillment or non-fulfillment of international obligations and obligations under the Covenant within the meaning of Article 1, para-

<sup>29</sup> Official Journal, 1933, Special Supplement No. 112, p. 73.

<sup>30</sup> *Ibid.*, p. 75.

<sup>31</sup> Official Journal, 1933, pp. 657-658.

<sup>32</sup> *Ibid.*

graph 3, though the Assembly's report of February 24, 1933, may serve in the future as a basis for judgment in regard to these obligations. Whether or not an interpretation of the provisions of the withdrawal clause will be made by the League organs before the expiration of the Japanese notice of intention to withdraw, remains to be seen.

#### GERMANY'S ACTION

On October 19, 1933, the German Government sent to the Secretary-General notification of its intention to withdraw from the League of Nations.<sup>33</sup> Germany's action was based on dissatisfaction with the League's failure to carry out the terms of Article 8 (Reduction of Armaments) of the Covenant. Thereafter, the German Government paid to the League \$134,000 in gold on its contributions in arrears and promised to settle its accounts entirely. Legally, Germany remains a member of the League and the German Government must continue to observe its obligations under the Covenant until its notice of withdrawal does become effective; even during and at the end of the period of notice, questions as to Germany's fulfillment of international obligations and obligations under the Covenant other than financial may be raised.

#### DETERMINATION OF THE FULFILLMENT OF THE OBLIGATIONS

Who is to determine whether a State desiring to withdraw has fulfilled "all its international obligations and all its obligations under this Covenant"? That question was debated at some length in the United States Senate in 1919 and 1920 when the Treaty of Versailles, of which the Covenant forms a part, was under consideration. It was urged that Article 1, paragraph 3, permitted the right of withdrawal of the United States to be passed upon by some organ of the League of Nations, and that it did not leave the matter of withdrawal entirely under the control of the State desiring to withdraw. A memorandum in regard to the interpretation of the withdrawal clause submitted to the Senate by Mr. Miller, declared this contention to be entirely unfounded:

It is impossible to discover any foundation for the argument advanced that in some way the council of the league (or the assembly) would have jurisdiction to pass upon the question of withdrawal. To exist such jurisdiction would have to be expressly conferred. No such jurisdiction is mentioned or even implied in the covenant. The right of withdrawal is given to each member of the league in its own uncontrolled discretion as not even a reason for withdrawal need be alleged.<sup>34</sup>

It was contended also that the proviso in Article 1, paragraph 3, did not qualify the right of withdrawal but introduced an obligation binding until the date of withdrawal. The words—"provided that all its international obligations and obligations under this Covenant shall have been fulfilled at the time of its with-

<sup>33</sup> Official Journal, 1934, p. 16.

<sup>34</sup> 58 Congressional Record, 66th Cong., 1st Sess., Aug. 4, 1919, p. 3605.

drawal," admitted the absolute right of withdrawal because they assumed the withdrawal had been completed by referring to it as a fact.

Suppose it were claimed by some power that the withdrawing member had not so lived up to its obligations, what would have to be alleged? First, that the withdrawing power had not fulfilled some one or more of its obligations, and second, that it had not fulfilled such obligations at the time of its withdrawal from the league. Thus, the contention that the fact of withdrawal could depend on the fulfillment of the proviso is conclusively answered, for any allegation of breach of the proviso would have to admit the fact of withdrawal from the League.<sup>35</sup>

In the light of this explanation of the withdrawal clause, it would seem adequate if Article 1, paragraph 3, had simply said: "Any member of the League may, after two years' notice of its intention so to do, withdraw from the League." Why include a specific provision regarding the fulfillment of obligations, if, in the first place, every member of the League has an absolute right of withdrawal upon two years' notice, and, secondly, if questions in regard to the non-fulfillment of obligations can be raised only after the fact of withdrawal has occurred, at which time the member which had withdrawn would no longer be subject to the jurisdiction of the League?

President Wilson, in explaining the withdrawal clause, expressed the view that the State giving notice of withdrawal would be the sole judge of whether or not it had fulfilled its international obligations and its obligations under the Covenant, restrained only by the influence of the public opinion of the world.<sup>36</sup> Among the reservations to the Treaty of Versailles which were voted in the Senate was one which specifically provided that the United States should be the sole judge, in case of notice of withdrawal, as to whether its international obligations and obligations under the Covenant were fulfilled.<sup>37</sup>

The Wilsonian interpretation of the withdrawal clause has not been supported by commentators on the Covenant of the League of Nations. Schücking and Wehberg have made an interesting suggestion with regard to the question of the agency which should decide whether or not a State desiring to withdraw from the League had fulfilled its obligations. They suggest that if any doubt arises over the question of the existence of an international obligation or over its fulfillment, in accordance with the spirit of the Covenant, a court should be asked to decide the matter. Their contention is that in such a case the League of Nations would be a party, and it would, therefore, be contrary to the demands of justice for the League, either through the Assembly or the Council, to make the decision. They suggest, however, that it might suffice if, in such case, the Council were to submit to the Permanent Court of International Justice a request for an advisory opinion on the question, and on the basis of that opinion to reach a decision.<sup>38</sup>

<sup>35</sup> 58 Congressional Record, 66th Cong., 1st Sess., Aug. 4, 1919, p. 3605.

<sup>36</sup> Cf. H. C. Lodge, *The Senate and the League of Nations* (1925), pp. 309-310.

<sup>37</sup> 59 Congressional Record, 66th Cong., 2nd Sess., Feb. 21, 1920, p. 3242.

<sup>38</sup> W. Schücking and H. Wehberg, *op. cit.*, p. 373.

The part to be played by one or both of the organs of the League in determining whether a State desiring to withdraw has fulfilled its obligations is not at all clear. It was the Council which assumed the initiative in extending to Brazil and to Spain invitations to return to the League before their notices of withdrawal took effect. It is the Council which has the power to expel a member which has violated any covenant of the League. In the exercise of that power, conferred upon the Council in Article 16, paragraph 4, the Council, presumably, would decide whether any member had violated any covenant of the League.

#### CONCLUSIONS

The Covenant of the League of Nations was framed on general principles which have necessitated much interpretation. The withdrawal clause is among those provisions of the Covenant whose terms have not, as yet, been elucidated. The exercise by the Japanese Government of its privilege to give notice of intention to withdraw under Article 1, paragraph 3, of the Covenant has called attention to the number of questions left unanswered by the text of that paragraph. An examination of the history of the making of the clause and of its development up to date does not reveal any definite answers to these questions. However, on the basis of such examination, the following suggestions with regard to the interpretation of Article 1, paragraph 3, may be ventured:

(1) "Obligations under this Covenant" refer not merely to financial obligations, but also to those fundamental commitments arising under Articles 10, 12, 13, and 15 of the Covenant.

(2) The inclusion of "international obligations" as well as "obligations under this Covenant" in the withdrawal clause seems to place upon the organs of the League the responsibility of deciding whether a State has fulfilled its international obligations before permitting such State to withdraw from the League. This marks a step towards a better fulfillment of international obligations, placing upon the League the responsibility for such fulfillment on the part of its members.

(3) It is not yet clear who is to decide whether a State desiring to withdraw from the League has fulfilled its international obligations and its obligations under the Covenant. The withdrawing State itself, the Assembly, the Council, the Permanent Court of International Justice (upon request for an advisory opinion), have all been cited as proper agencies to make that decision.

(4) The Wilsonian interpretation of the withdrawal clause which would leave the decision entirely with the individual State, does not seem to be consistent with the wording or the spirit of the Covenant.

(5) Article 1, paragraph 3, seems to confer upon one or both of the organs of the League the power to make the decision with regard to withdrawal and thereby to say that a member may not withdraw because it has not met its international obligations or its obligations under the Covenant. In the exercise

## THE RETROACTIVE EFFECT OF THE RATIFICATION OF TREATIES

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The doctrine which is here being discussed has been stated as follows:

A treaty is binding on the contracting parties, unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date.<sup>1</sup>

In this form, more or less, the doctrine has been stated and accepted by well-known writers on international law.<sup>2</sup> It has gained a peculiar degree of support in the United States not only amongst writers, but also in the decisions of American courts. It is not merely for this reason that it demands particular attention, but because the whole question of the juridical effect of ratification is of topical and practical importance.

✓ In the year 1806, the Circuit Court for the Third Circuit, delivered in the case of *Hylton's Lessee v. Brown*,<sup>3</sup> a decision which was the first of a whole series of American decisions in which this doctrine was laid down and approved again and again. In some of these cases the doctrine was not a vital issue; and yet the court thought it necessary to emphasize it. In some, although it was relevant, it was applied rather in deference to the weight of judicial opinion by which it was supported, rather than as a result of an examination of the principles of international law. American writers could hardly fail to be influenced by these decisions, and there were writers in Europe who were not convinced that the doctrine was unsound.<sup>4</sup>

<sup>1</sup> 5 Moore's International Law Digest, 244.

<sup>2</sup> Westlake, 1 International Law, 1904, p. 281; Hall, International Law, 8th ed., p. 389; Woolsey, International Law, 5th ed., p. 178; Wheaton, International Law (Lawrence), p. 326 (Dana), pp. 336, 718, quoting Martens and Heffter; Wharton, International Law Digest, 1886, § 132; Taylor, International Public Law, 1901, p. 389; Hershey, International Public Law, 1912, p. 344; Hyde, 2 International Law, 1922, pp. 49-50; Crandall, Treaties, Their Making and Enforcement, p. 344; Klüber, *Droit des Gens*, 1861, p. 182; Heffter, *Das Europäische Völkerrecht*, 1888, p. 193; Von Neumann, *Grundriss des heutigen europäischen völkerrechts*, 1885, p. 66; Bluntschli, *Das Moderne Völkerrecht*, 1878, Art. 421; Mérignhac, 2 *Traité de droit public international*, 1907, p. 667. The following writers reject the doctrine: Coleman Phillipson, *Termination of War and Treaties of Peace*, 1916, p. 196; Fauchille, *Traité de droit international*, 8th ed., Vol. 1, Pt. III, p. 319; Pradier-Fodéré, 2 *Traité de droit international*, 1885, § 1118; Rivier, 2 *Principes du droit des gens*, 1896, p. 79; Hoijer, *Les traités Internationaux*, 1928, p. 134; Von Liszt, *Das Völkerrecht*, 1925, p. 252; Strupp, 2 *Droit International*, 1930, p. 270. See also Basdevant, *Académie de droit international*, 15 *Recueil des Cours*, p. 583; Dupuis, 2 *loc. cit.*, p. 330; McNair, 43 *loc. cit.*, pp. 298-302; Anzilotti, *Cours de droit international* (Gidel trans.), pp. 357-374.

<sup>3</sup> (1806), 1 Wash. C. C. 298, 343.

<sup>4</sup> Cited in note 2.

From the standpoint of American doctrine, the case of *Hylton's Lessee v. Brown* requires special attention. It was an action for ejectment, brought by a plaintiff claiming under a lease from one Joseph Griswold, made in the year 1789. The defendant pleaded that the land in question had been confiscated and regularly forfeited under the laws of Pennsylvania, where the land was situated, and that it had been sold to several persons and finally conveyed to C., from whom the defendant derived his title. This sale and conveyance took place in 1780, before the date of the plaintiff's lease. The defendant alleged that Joseph Griswold had forfeited his land under an act of attainder and a proclamation made in 1778, and, further, that any irregularity in these acts was cured by an act of the Pennsylvania Legislature, of January 31, 1783. This act provided that "no misnomers or mistakes in name, addition, or description, in the proclamations issued by the Executive requiring persons to surrender themselves on pain of being attainted of high treason should avail to enable heirs etc., to recover estates siezed and sold as forfeited."

The plaintiff denied the validity of this act, on the ground that it was in conflict with a treaty between the United States and Great Britain for preliminary articles of peace. This treaty was signed on November 30, 1782. The treaty was entitled "Articles agreed upon. . . . To be inserted in, and to constitute the Treaty of Peace proposed to be concluded between the Crown of Great Britain and the said United States; but which treaty is not to be concluded until Terms of Peace shall be agreed upon between Great Britain and France, and His Britannic Majesty shall be ready to conclude such treaty accordingly." Article 6 provided:

There shall be no future confiscations made, nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall, on that account, suffer any future loss or damage, either in his person, Liberty or Property.

It was "done at Paris 30th November, 1782," but contained no provision as to when it should take effect other than that contained in the preamble.<sup>5</sup> The coming into force of the treaty of peace between the United States and Great Britain was thus suspended until terms of peace should be agreed upon by Great Britain and France. The Franco-British articles of peace were signed at Versailles on January 20, 1783, but ratifications were not exchanged until February 3.<sup>6</sup> The question was: Did these articles come into force on January 20, or on February 3, so as to bring the British-American treaty into force on either date? If the British-American treaty came into force on January 20, then the Act of 1783 was invalid in so far as it was in conflict with the

<sup>5</sup> Miller, 2 *Treaties and other International Acts of the United States of America*, p. 96; Treaty Series No. 102.

<sup>6</sup> Martens, 3 *Recueil de Traité*s, p. 503. These articles contained no express provision as to when they should come into force.

treaty, for it was passed after it (January 31) but before ratifications were exchanged (February 3). The plaintiff contended that the ratifications related back to signature, citing Grotius, Vattel, and Martens as authorities. The only judicial decision cited in support of this proposition was a British prize case which does not seem to have been in point.<sup>7</sup> The court, however, sustained the plaintiff's contention in the following terms:

It is contended [by the defendant] that this treaty can only be considered as made on the 3rd of February following, when it was ratified; and in support of this opinion, it is stated, that, by its terms, it was suspended till ratification. No evidence of this has been given; and from the substance of these preliminary articles . . . there is no reason to suppose that this was the case. . . . But even if this were the fact, as to this treaty; . . . we do not think it would affect the case, because, when ratified, the treaty would relate back to the signing. The ratification is nothing more than evidence of the authority under which the ministers acted. . . . I am constrained, then, to say, that the terms of peace were agreed on between Great Britain and France, on the 20th of January, and consequently that the contingency, on which the treaty between Great Britain and the United States was to take effect, happened on, and was binding upon, the two nations, from that day, if no sooner (pp. 311-312).

The court then went on to say: "Upon the whole, then, it is the opinion of the court, that the law of the 31st of January, 1783, is posterior to the treaty of peace, which is the supreme law" (p. 313).

The court, therefore, gave judgment for the plaintiff on two main grounds. First, it found as a fact that Joseph Griswold was not truly and properly described in the proclamation of 1778 as one whose lands were forfeited for treason. Secondly, this defect was not cured by the Act of 1783 because it was posterior to the treaty between Great Britain and the United States, inconsistent with Article 6 of that treaty and therefore to that extent void. Nor could the act "validate" an imperfect attainder for that would be a new confiscation. Consequently the plaintiff's title was good. A *venire de novo* was awarded and the case was re-argued, and the first decision affirmed. The words "agreed upon" and "concluded" in the British-American treaty were interpreted by the court at the second hearing. "Agreed upon" meant "a final understanding by ministers as to the terms of the treaty and the reduction of the terms into writing." "Concluded" referred to the moment when "the agreement thus understood has received its last form by being signed and duly executed by the ministers" (p. 351). The Franco-British treaty was so "agreed upon" and "concluded" on January 20.<sup>8</sup>

<sup>7</sup> The case referred to is *The Mentor*. No citation is given in the argument, but presumably the case is that reported in Prize Cases heard before the Lords of Appeal (1783-84), folio 401. Another case of that name is *The Mentor* (1799), 1 Rob. 179, but this is even less relevant.

<sup>8</sup> The court could have presumably made this the ground of decision, and based its judgment upon its interpretation of the intention of the parties as expressed by these words, without resorting to any general rule as to the date from which it took effect.

The case of *Hylton's Lessee v. Brown* has been dealt with at length because it is the fountainhead of American doctrine on this subject, and later decisions are expressly based on it. What were the authorities which were invoked to support the existence of the rule thus laid down by the court? It is important to note what they were, for the case must be appreciated in the light of the international practice and legal opinion of its day. Grotius, Vattel, Martens, the classic writers of the seventeenth and eighteenth centuries, were invoked to prove the rule contended for, which the court ultimately accepted. No doubt the enormous influence which these writers exercised in their day (and particularly Vattel so far as the United States is concerned) may explain to some extent the persistence with which the rule was repeated throughout the nineteenth century by courts and writers; but it may be questioned whether the opinions they expressed then, based largely on the practice of their time, can be accepted as valid for the international law of today. The opinion of Grotius on points of treaty law is of little practical interest to us today, and even in the eighteenth century his authority on such points was not as great as that of Vattel and Martens.

In 1758 Vattel wrote as follows:

The treaty of peace binds the contracting parties from the moment it is concluded and has passed through the formalities attending its acceptance, and they must see to it that it is immediately carried into effect. From that time all hostilities must cease unless a definite day has been set when peace is to begin. But the treaty does not bind the subjects until they have been notified of it. The same rule holds as of a truce.<sup>9</sup>

Martens' *Précis du droit des Gens* was first published in 1788, and a translation, made by William Cobbett, called *Summary of the Law of Nations*, was published in 1795. The latter, though not a literal translation, was often used in American courts. In the *Summary* of 1795 we read:

Of treaties in general. Anything that has been promised by the chief or his agent beyond the limits of the authority with which the State has entrusted him, is at most no more than a simple promise (*sponsio*). . . . On the contrary, everything that has been stipulated by an agent in conformity with his full powers ought to become obligatory for the State from the moment of signing without waiting even for a ratification. However, not to expose the State to the errors of a single person, it is now become a general maxim that public conventions do not become obligatory till ratified.<sup>10</sup>

But in the second edition of the *Précis* in 1801, there is the following statement: "*Mais lorsque les ratifications ont été échangées elles rendent le traité obligatoire à dater du jour de sa signature à moins qu'on n'ait expressément stipulé le contraire.*"<sup>11</sup>

<sup>9</sup> Vattel, *Droit des gens*, trans. in Classics of International Law series, published by the Carnegie Endowment, Book IV, Chap. 3, § 24.

<sup>10</sup> *Summary of the Law of Nations*, 1795, Book II, Chap. 1, 33. Vattel had stated the same rule, *Droit des gens*, Book II, Chap. 12, § 153.

<sup>11</sup> Martens, *Précis du droit des gens*, 1801, Book II, Chap. 2, § 48. And see his "*Essai*

These texts seem to afford slender authority for a proposition whose accuracy is to be determined primarily by reference to practice. Nevertheless, the idea of ratification as being a mere confirmation of an authority duly exercised was a predominant factor in formulating such a decision. It is a familiar conception of law that a ratification or confirmation of an act by an agent validates the act as from the time of its execution, and it was natural to extend this to the agents of the head of state.

In 1832, the Supreme Court of the United States, in the *United States v. Arredondo*<sup>12</sup> laid down a limitation on the doctrine in *Hylton's Lessee v. Brown*. On November 11, 1828, Arredondo and others filed a petition in the Superior Court of Florida claiming title to an undivided parcel of land under a grant made by the Spanish authorities on December 22, 1817. The petitioners averred that the cession of East Florida to the United States had made impossible the performance of the condition upon which the grant was made, and further, that the United States had failed to ratify the grant as they were bound to do under the treaty with Spain of 1819. Judgment having been given against the United States in the court below, the case came before the Supreme Court of the United States. The United States argued first, that the grant was annulled by Article 8 of the treaty between the United States and Spain of February 22, 1819; secondly, that title was vested in the United States by virtue of Article 2 of the same treaty, whereby all lands in East and West Florida were ceded by Spain to the United States. Ratifications of this treaty were exchanged on February 22, 1821. Article 8 provided:

All grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which the said grants shall be null and void. All grants made since the 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void.

The petitioners averred that they were entitled to the benefit of that part of this article which allowed a prolongation of the time within which the conditions of the grant could be performed. It appeared that in the original grant a time limit of three years was imposed, within which the petitioners were to proceed with the establishment of families on the land, etc. But by a decree dated December 2, 1820, an extension of time of one year was granted by the

*concernant les armateurs, les prises, etc.,*" 1795, Chap. 3, §§ 41 and 61, and examples given there.

<sup>12</sup> 6 Peters, 691.

Spanish authorities, and the petition averred that settlements had been made both before and after this extension of time, and were continuing. To this the United States replied that the prolongation of time was made after the ratification of the treaty by the King of Spain and was therefore void for want of authority. The Supreme Court decided that the validity of the grant must be upheld. "Shall be ratified and confirmed" meant, in its opinion, that the grants already "made" at the date of ratification were confirmed. As to the argument that the extension of time was without authority the court said:

But the ratification by the United States was in February following, and the treaty did not take effect, till its ratification by both parties operated, like the delivery of a deed to make it the binding act of both. That it may and does relate back to its date, as between the two governments, so far as respect the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail.

The judgment of the court below was therefore affirmed. Only the dissenting opinion of Thompson, J., was based on the doctrine of retroactivity. He took the view that the plaintiffs must, in order to succeed, show that they were in actual possession of the land at the "date" of the treaty. The "date" of the treaty was, in law, the date of signature and not of ratification. He said:

The ratification is nothing more than evidence of the authority under which the minister acted. A government is bound to perform and observe a treaty made by its minister, unless it can be made to appear, that he has exceeded his authority. But a ratification is an acknowledgment that he was authorized to make the treaty; and if so, the nation is bound, from the time the treaty is made and signed. . . . It is, therefore, in my opinion, a case not coming within the saving provision in the eighth article of the treaty.

In 1850, in the cases of the *United States v. Reynes*<sup>13</sup> and *Davis v. Police Jurý of Concordia*,<sup>14</sup> the Supreme Court of the United States again approved of the doctrine asserted in *Hylton's Lessee v. Brown*. In the *United States v. Reynes* the appellant claimed certain land included within the limits of Louisiana by virtue of a grant made by a Spanish governor on January 2, 1804. The treaty of cession of Louisiana to France by Spain was signed on October 1, 1800. This was the secret Treaty of San Ildefonso entitled "for the aggrandisement of the States of Parma and the retrocession of Louisiana to France." Ratifications of this treaty were exchanged on October 30, 1800. In consideration of France procuring "an aggrandisement of territory" to the Duke of Parma, His Catholic Majesty agreed to retrocede to the French Republic, six months after the complete fulfilment of the promise made by France, the colony of Louisiana.<sup>15</sup> The actual transfer by Spain to France was made on November 30, 1803. The treaty of cession of Louisiana by

<sup>13</sup> 9 Howard, 127.

<sup>14</sup> *Ibid.*, 280.

<sup>15</sup> De Clercq, 1 *Recueil des traités de la France*, p. 411.

France to the United States was signed on April 30, 1803 (before the transfer by Spain) and ratifications were exchanged on October 21, 1803.<sup>16</sup> The actual transfer of Louisiana by France to the United States took place on December 30, 1803. It was held that the grant in question in this case was null and void, because at the date of the grant (January 2, 1804) Spain had already parted with her sovereignty over Louisiana. This would appear to be a sufficiently good ground of decision, standing alone, but the court thought it necessary to reaffirm the doctrine of retroactivity. It said (at p. 148):

In the construction of treaties, the same rules which govern other compacts properly apply. They must be considered as binding from the period of their execution; their operation must be understood to take effect from that period, unless it shall, by some condition or stipulation in the compact itself, be postponed. . . . This treaty [between the United States and France] therefore operated from its date.

Here, if we will, is assumption without argument. In general, an instrument does take effect from the date of its execution, but the whole question at issue was—when is a treaty legally “executed”? It must be added that in the particular case before the court the treaty texts were sufficiently clear to have made it unnecessary to refer at all to the question as from what date a treaty takes effect. Its observations on this point should be considered as *obiter*.<sup>17</sup> The *ratio decidendi* is that the sovereignty of Spain had ceased to exist over Louisiana at the time the grant was made; the court suggests that it ceased to exist “at the latest” on October 15, 1802, when the Spanish Crown issued an order announcing the retrocession of Louisiana to France. On any view of the matter, the discussion of the doctrine does not appear to have been necessary, for the grant was made on January 3, 1804, after all the material dates, *i.e.*, after the treaty of cession by France to the United States had been carried into effect by the actual transfer of the territory to the United States. The fact of the signature of a treaty of cession by France before the actual transfer had been made by Spain, indicated that France regarded herself as the legal sovereign in Louisiana at least from the moment the order was made by Spain, on October 15, 1802, renouncing her sovereignty over Louisiana. Whilst the case of the *United States v. Reynes* was rightly decided on the facts, the introduction of the doctrine of retroactivity was clearly unnecessary.

*Davis v. Police Jury of Concordia*<sup>18</sup> turned upon the point already raised in the *United States v. Reynes*, namely, as from what date did the Treaty of San Ildefonso come into force? In this case a Spanish governor had made a grant of a perpetual franchise, “a privilege of a ferry at the post of Concordia as a privilege attached to the plantation of the petitioner.” The grant was

<sup>16</sup> Malloy, 1 *Treaties, etc.*, between the United States and other Powers, p. 508.

<sup>17</sup> The court also (at p. 150) introduced the issue of *mala fides* on the part of Spain in making such grants after the treaty had been signed.

<sup>18</sup> 9 Howard, 280.

made on February 19, 1801. Article 3 of the Treaty of Paris<sup>19</sup> between the United States and France, which was signed on April 30, 1803, and ratifications of which were exchanged on October 21, 1803, provided:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

It was complained that the establishment by the Police Jury of Concordia of a ferry across the Mississippi was in conflict with this provision. The question therefore arose whether the plaintiff's grant was valid, which in turn must be answered by asking whether Spain was sovereign over the territory on February 19, 1801. The court held that she was not sovereign over the territory in question on that date, and that the plaintiff must fail in his action, for two reasons. First, it was the official view of the Government of Spain and of the United States that the Treaty of San Ildefonso operated from its date. Secondly, it was a rule of international law that treaties in general operated from the date of signature, the court quoting in support of this view Vattel, Martens and the English decision in *The Fama*.<sup>20</sup> In its judgment the court said:

. . . The law of nations does not recognize in a nation ceding a territory the continuance of supreme power over it after the treaty has been signed, or any other exercise of sovereignty than that which is necessary for social order . . . to keep the cession in unaltered value. . . . There is not in the diplomacy of nations a more absolute surrender of dominion, than was made by the King of Spain in the Treaty of St. Ildefonso of October, 1800.

This shows a curious tendency to substitute a formal dogma for the express provisions of a treaty. The provisions of the Treaty of San Ildefonso have already been stated. The King of Spain "agreed" to retrocede to the French Republic six months after the complete fulfilment of the promise made by France as to the "aggrandisement of territory" of the Duke of Parma.<sup>21</sup> Spain did not "cede" the territory of Louisiana by the Treaty of San Ildefonso, and there was no "absolute surrender of dominion."<sup>22</sup>

Finally, it must be pointed out that the case of *The Fama*<sup>23</sup> did not, as assumed by the court, lay down the proposition that a treaty operates from the date of signature. It is no authority for such a proposition. On the contrary, it was there held that the Treaty of San Ildefonso did not operate, from signature, to pass sovereignty in Louisiana to France. It was a case of a demand for the condemnation of ships of Spanish subjects sailing for Louisiana

<sup>19</sup> Malloy, *ibid.*

<sup>20</sup> (1804), 2 Rob. 106.

<sup>21</sup> De Clercq, *ibid.*, Art. III of the treaty.

<sup>22</sup> The court itself, in *United States v. Reynes*, *supra*, drew the distinction between the "agreement" and its execution later by Spain.

<sup>23</sup> (1804), 5 Rob. 106.

before that territory had been actually transferred to France, but after the Treaty of San Ildefonso. It was held that the ship must be restored on the ground that at the time of the capture they were sailing for (neutral) Spanish territory. "There must be delivery," said Lord Stowell, "for seisin and possession must accompany the words."

The leading American cases have been examined primarily with a view to showing that eminent American judges in the early half of the nineteenth century believed the doctrine to be a positive rule of international law. Henceforth the doctrine came to be regarded as established so far as the courts of the United States were concerned. In 1851, the Supreme Court of the United States again invoked it, and held on this ground that grants made on March 11, 1763, by the *de facto* French authorities in Louisiana after the signature of the Treaty of Paris of February 10, 1763, between France and Great Britain, were void.<sup>24</sup> There are *dicta* in cases decided during the last half of the nineteenth century, and even in quite recent times, in which the doctrine is repeated as the undoubted view of American courts.<sup>25</sup>

In 1932 the Texas Court of Civil Appeals applied the doctrine to a convention of 1905, between the United States and Mexico, so as to transfer title to certain land as from the date of signature of the convention.<sup>26</sup> In 1907, in *Beam v. United States*,<sup>27</sup> and in 1910, in *Macleod v. United States*,<sup>28</sup> the Court of Claims followed the decision in *United States v. Arredondo*,<sup>29</sup> though observing that retroactivity was the "well-settled rule of international law."

Such has been the unmistakable position of the American courts. The Department of State seems to have accepted the weight of judicial opinion in the subject, and has more than once asserted the same view. In 1839, the Secretary of State protested against an adverse decision of one of the American claims against the States of New Granada, Ecuador, and Venezuela (the states which once formed the Republic of Colombia). This claim was rejected on the ground that the capture for which compensation was demanded took place a few days before the exchange of ratifications of a treaty between the United States and Colombia which stipulated that "free ships make free goods." The American Secretary of State, in a letter to Mr. Semple, *Chargé d'Affaires* at New Granada, protested against the decision, and apparently invoked the rule here discussed.<sup>30</sup> In 1847, the United States clearly asserted the view that a treaty comes into force as from the date of its signature. After

<sup>24</sup> *Montault v. United States* (1851), 12 Howard, 47.

<sup>25</sup> *Re Metzger* (1847), 17 Fed. Cas. No. 9511; *United States v. Dauterive* (1850), 10 Howard, 609; *Shepard v. Northwestern Life Insurance Co.* (1889), 40 Fed. Rep. 341; *Bush v. United States* (1894), 29 Ct. Cl. 144; *Dooley v. United States* (1901), 182 U. S. 223; *United States v. Grand Rapids* (1907), 165 F. 297.

<sup>26</sup> *San Lorenzo Title and Improvement Co. v. City Mortgage Co.* (1932), 48 S. W. (2d) 310. (1907), 43 Ct. Cl. 61.

<sup>27</sup> (1832), 6 Peters, 691; also followed in *Haver v. Yaker* (1870), 9 Wall. 32.

<sup>28</sup> (1910), 45 Ct. Cl. 339.

<sup>29</sup> (1832), 6 Peters, 691; also followed in *Haver v. Yaker* (1870), 9 Wall. 32.

<sup>30</sup> 5 Moore's Digest, p. 245. No report of the tribunal's work or its sentence in this case appears to have been published.

the recognition of Peru by the United States in 1826, negotiations were opened for the settlement of American claims in respect of damage to property. On January 21, 1841, a settlement of \$300,000 was agreed upon and the agreement was embodied in a treaty signed on March 17, 1841.<sup>31</sup> In February, 1847, the Peruvian Government paid \$30,000, but without interest, claiming there could be no interest legally due as from January 1, 1844,<sup>32</sup> because at that date ratifications had not been exchanged and the treaty was not in force. The Department of State returned the obvious answer that January 1, 1844, was the date fixed for the treaty, but that in any case the United States Government could not agree that a treaty came into force only as from the date when ratifications were exchanged. On September 18, 1847, Mr. Buchanan wrote to Mr. Clay, the American Minister, as follows:

In February last the Peruvian Government paid to Mr. Jewett the sum of thirty thousand dollars, the first instalment due under the convention, but without interest, and at the same time, applied to this government, through him, to consider the first instalment to have been due, not on the first of January, 1846, according to the express terms of the convention, but on the first day of January, 1847. They appear to have rested this application upon the ground that the ratifications of the treaty had not been exchanged until after the first of January, 1846. But, independently of the date having been fixed by the convention itself when the first instalment should be paid, the general rule of public law is that a treaty is binding on the contracting parties from the date of signature unless it contains an express stipulation to the contrary. The exchange of the ratifications has a retroactive effect, confirming the treaty from this date.

The situation in Peru at the time does not seem to have permitted a discussion of such "rules of public law" and it does not appear that the United States pressed the point any further.<sup>33</sup> In 1901, presumably influenced by judicial precedent, the Attorney-General of the United States advised that Porto Rico, which was ceded to the United States by the Treaty of Peace with Spain, signed on December 10, 1898, passed under American sovereignty as from that date, so as to be included in the operation of an Act of Congress passed in 1899, but before the ratifications of the treaty had been exchanged.<sup>34</sup>

Considering the fact that this view has been supported by the United States courts, and has on occasion been put forward by the executive, it is curious to

<sup>31</sup> 8 United States Statutes at Large, p. 570.

<sup>32</sup> This was the date fixed by Art. 2 of the treaty for the payment of the first instalment. On Oct. 21, 1845, the Peruvian Congress voted a law making the first instalment payable on Jan. 1, 1846, instead of Jan. 1, 1844. This modification of the article was accepted by the United States, but subject to the reservation that interest should run, for all payments, as from January, 1842. Ratifications of the treaty, as thus informally modified, were exchanged on Oct. 31, 1846.

<sup>33</sup> Sen. Exec. Doc. 58, 31st Cong., 1st Sess. And see Lapradelle & Politis, 2 *Recueil des Arbitrages Internationaux*, note at p. 250.

<sup>34</sup> 23 Opinions of the Attorneys-General, 551, quoting Halleck's *International Law* (1861 ed.) at p. 815. Yet Halleck definitely rejects the doctrine of retroactivity as applied to the ratification of treaties.

find so little support for it in international practice and arbitral decisions. There is no evidence that it has played any part in the diplomatic practice of European States during the past hundred years; and only in one international arbitration does it seem to have been upheld. In 1875 there was an arbitration between Peru and Chile, apportioning expenses incurred in the joint enterprise of defense against Spain, in accordance with the treaty of alliance of 1865. This treaty was signed on December 5, 1865, and ratifications were exchanged on January 14, 1866. Article six provided: "The present treaty shall be ratified by the governments of both republics, and the ratifications shall be exchanged at Lima within forty days or sooner if possible. In faith whereof . . ." The issue arose as from what date the expenses began to run—as from the date of the signature of the treaty or as from the date when ratifications were exchanged. The decision is therefore directly in point. However, after stating the date of signature, and the date of the exchange of ratifications, the arbitrator contents himself with the bold statement, "It therefore became operative from the former date" (signature). There is in this case no discussion and no reference to international practice.<sup>35</sup>

In the Iloilo Claims,<sup>36</sup> before the British-American Claims Tribunal, in 1925, there was considerable discussion of the question by counsel. The claims were made by Great Britain against the United States before a tribunal constituted under a special agreement of 1910, in respect of certain property which had been destroyed by Filipinos at Iloilo in the month of February, 1899. The grounds of the British case were, first, that the United States Government became responsible for the maintenance of order in Iloilo, as from the date of the signature of the Treaty of Paris, on December 10, 1898; secondly, that the United States had been negligent in not sending troops to Iloilo in time, and in not taking the necessary steps to protect life and property. The Treaty of Paris, whereby Spain (in Article 3) ceded to the United States "the archipelago known as the Philippine Islands," was signed at Paris on December 10, 1898. Ratifications were not exchanged until April 11, 1899, that is to say, after the disturbances in respect of which the claims were being made. Article 5 of the treaty provided:

Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines. . . . The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two Governments.

The United States answer alleged that the destruction of property in respect of which the claims were made, took place in Spanish territory, that is to say, at a time when Iloilo was still under Spanish sovereignty. It was urged that sovereignty over the Philippine Islands did not pass to the United States until April 11, 1899, when the treaty of peace became effective by the exchange

<sup>35</sup> Lafontaine, *Pasicrisie Internationale*, 159; Moore's *International Arbitrations*, 2091. The arbitrator cites Wheaton (Lawrence's ed.), p. 326, but gives no other authority to support his view.

<sup>36</sup> Nielsen's Report, p. 382.

of ratifications, and that, therefore, when the losses occurred, the United States was under no legal obligation to protect the lives or the property of the claimants. During his oral argument, counsel for the British Government argued that, although "technically a treaty does not go into force until ratifications have been exchanged . . . if the action of one party makes it quite clear that they propose to act in advance of the exchange of ratifications, the treaty must be held to go into force" (at p. 393). He then cited *Davis v. Police Jury of Concordia and United States v. Reynes*, though not "personally attaching much importance to the authorities I have quoted," his object being to show there was some precedent for the proposition. Yet, it is to be noted that the proposition which the British Agent puts forward does not go as far as the doctrine embodied in the American cases, and it is clear that he cited these decisions rather to embarrass the American Agent with the opinions of the judicial authorities of his own country, than with any conviction that they embodied sound doctrine. The British Agent in this case appears to have preferred to rest his argument (as to the taking effect of the treaty from the date of signature) upon the intention of the parties that the treaty should so operate, or upon the action of one party being explicable only on this assumption rather than upon a categorical rule of international law that exchange of ratifications is retroactive to the date of signature. It is also to be noted that he cites no European precedents on the point, although writers such as Rivier are mentioned. The American Agent said he proposed "to ignore these expressions" in the Supreme Court decisions "about the going into force of a treaty from the time of signing," and to deal with the "well known facts of international practice." He denied that these cases stood for the proposition "that ratification is retroactive to signature, and argued that they merely embodied the doctrine of "fraud upon the party" between signature and the exchange of ratifications. The tribunal rejected the British argument, and held that "*de jure* there was no sovereignty over the island until the treaty was ratified," without further discussion of the questions which had been raised. But the result of its decision was to accept the date of the exchange of ratifications, and not the date of signature, as the date from which the treaty was effective.

The *dicta* of the Permanent Court of International Justice throw very little additional light upon the question. The court has hinted that it may be, under international law, that a signed but unratified treaty can produce certain legal consequences.<sup>37</sup> It has, however, declared categorically that it is a rule of international law that treaties "save in certain exceptional cases, are binding only in virtue of their ratification."<sup>38</sup> In the case concerning certain German interests in Upper Silesia,<sup>39</sup> the Polish Government in its counter-case alleged that certain acts of alienation by the German Government between the date of the signature of the Treaty of Versailles, and the date of its

<sup>37</sup> Series A, Judgment No. 2, p. 33; Series A, Judgment No. 5, p. 39.

<sup>38</sup> Series A, Judgment No. 16, pp. 20-21. And see opinion of Judge Moore, Series A, Judgment No. 2, p. 57.

<sup>39</sup> Series A, Judgment No. 7.

actual coming into force, were illegal on the ground that they violated the principle that "the contracting states ought not during the period of time between the date of the signature and that of the coming into force of the treaty to do anything which might prejudice or render impossible the future execution of the treaty."<sup>40</sup> But the Polish Government recognized that, "according to the general principles of the law of nations, the formal entry into force of the treaty commences only from the exchange of the instruments of ratification." The German Government relied upon this rule as a sufficient answer to the point raised by Poland.<sup>41</sup>

(Thus it would appear that, so far as international practice and arbitral decisions are concerned, the evidence is not favorable to the existence of the rule which is being discussed.<sup>42</sup> ) Nor do the municipal decisions of the leading European countries give it any place. A *dictum* of Lord Stowell, tucked away in an obscure passage, indicates that, for a passing moment, the idea appears to have had his support. Thus, he remarks, in *The Elisebe*, that "in matters of treaty, it is true, the act of ratification may be said to operate with retrospective effect to confirm the date of the treaty from the date of the preliminary articles."<sup>43</sup> But these remarks were *obiter*, and it is impossible to say that Lord Stowell supported the doctrine merely on the strength of them. Any doubt that may have existed in his mind must have disappeared by 1813, when he delivered judgment in *The Eliza Ann*.<sup>44</sup> American ships had been seized by a British warship. A claim was made by the Swedish Government for the release of the ships on the ground that they were taken on Swedish neutral territory. The question arose: Was Sweden neutral on August 11, 1812, the date when the ships were seized? The treaty of peace between Great Britain and Sweden was signed on July 18, ratified by Great Britain on August 4, and by Sweden on August 14, in the year 1812.<sup>45</sup> Lord Stowell held that the ships were captured before the coming into force of the treaty, and rejected definitely the argument that "the treaty when ratified refers back to the time of signature." He held that "the ratification is the point from which the treaty takes effect." The English High Court, a century later, reached the same conclusion, in three cases raising the question in connection with the treaties of peace at the end of the World War.<sup>46</sup> These decisions appear to represent the view of the English courts on the matter.<sup>47</sup>

<sup>40</sup> Series C, Judgment No. 11 (Vol. 2), pp. 631-632.

<sup>41</sup> Series C, Judgment No. 11 (Vol. 2), p. 825; and see Series C, Judgment No. 11 (Vol. 1), pp. 183, 228.

<sup>42</sup> The United States-Mexican Claims Commission, in 1868, rejected all claims arising after the exchange of ratifications of the treaty setting up the commission. But this decision was clearly based on the intention of the parties as expressed in Art. 5 of the convention. See Moore, *International Arbitrations*, 1352. <sup>43</sup> *The Elisebe* (1804), 5 Rob. 189.

<sup>44</sup> (1813), 1 Dod. 244.

<sup>45</sup> British and Foreign State Papers, 1812-1814, Pt. I, p. 15.

<sup>46</sup> *Kotzias v. Tyser* (1920), 2 K. B. 69; *Lloyd v. Bowring* (1920), 36 T. L. R. 398; *Rattray v. Holden* (1920), 36 T. L. R. 798.

<sup>47</sup> See discussion by McNair, *Académie de droit international*, 43 *Recueil des Cours*, pp. 298-302.

In France,<sup>48</sup> Germany, and Switzerland,<sup>49</sup> treaties are applied as from the date of internal promulgation, and the courts, in general, pronounce only upon the internal, and not the international, validity of treaties. No pronouncement in favor of the doctrine is to be found in the judicial decisions of these countries, and none can be expected. In 1925, the Italian Court of Cassation held that the Treaty of St. Germain came into effect from the date of the exchange of ratifications and not from the date of signature.<sup>50</sup> But in 1927 the same court adopted the views held in the French and German courts that a treaty comes into effect, as far as the courts are concerned, as from the date of its proclamation as an internal law and not as from the date of the exchange of ratifications.<sup>51</sup> In two decisions of the Supreme Court of Poland, the provisions of a treaty were held to apply to facts occurring before ratifications were exchanged, but the importance of these decisions is limited to the facts in the cases involved, and they do not support the doctrine of the retroactive effect of ratification.<sup>52</sup>

Thus the English and Continental decisions indicate that judicial opinion in Europe leans strongly in favor of the rule that a treaty which requires ratification under international law, in the absence of contrary provision, takes effect as from the date of the exchange of ratifications, and not as from the date of signature. This, too, appears to be the considered opinion of the more recent writers in Great Britain and in Continental Europe.<sup>53</sup>

How was it that such a doctrine gained such a large measure of support? There is no apparent advantage in having a treaty come into force as from the date of signature, and, if desired in a particular case, express provision can be made for it.<sup>54</sup> It is submitted that the doctrine is an echo of the practice of the eighteenth century. Ratification was then regarded as a confirmation of signature, the ratification of the act of an agent by his principal. The familiar maxim of private law *ratihabitio retrotrahitur ad initium* was therefore the root of the doctrine. Practice in the eighteenth century attached great importance to the actual signature of a treaty, and ratification was often stated to

<sup>48</sup> As to French doctrine, see Fauchille, *Traité de droit international*, 8th ed., Vol. I, Pt. III, p. 346; Barthélémy et Duez, *Droit constitutionnel*, pp. 765-766; Esmein, *Eléments de droit constitutionnel*, p. 768; Pillaut in Clunet (1919), p. 595. See also decisions of the *Cour de Cassation* in Dalloz, *Recueil périodique* (1834), I, 409, Sirey, *Recueil générale* (1863), I, 353.

<sup>49</sup> Swiss and German doctrine are similar. See 34 *Zeitschrift für Schweizerisches Recht* (1915), pp. 145, 437.

<sup>50</sup> Annual Digest of Public International Law Cases, 1925-1926, Case No. 256.

<sup>51</sup> *Ibid.*, 1927-1928, Case No. 245.

<sup>52</sup> *Ibid.*, 1927-1928, Case No. 274, and see note at p. 399.

<sup>53</sup> For citations see note 2 above.

<sup>54</sup> In such cases the exchange of ratifications possibly has a retroactive effect by virtue of the express proviso. For examples, see the convention respecting Wei-hai-wei between Great Britain and China, 1898; the Treaty of Paris, Dec. 10, 1898; the Treaty of Rapallo, 1922; the Balkan Pact of Non-Agression, Feb. 9, 1934; and various treaties of arbitration such as that between Great Britain and Portugal in 1914.

follow as a matter of legal obligation.<sup>55</sup> ✓ At the present day, ratification is generally regarded, in the absence of any provision or intention dispensing with it, not only as an essential condition of the coming into force of a treaty, but as a condition which a State may fulfil or not fulfil as it pleases. It is the modern practice of the Great Powers of the world expressly to reserve complete liberty, in the matter of ratification, in the full powers which they issue to their representatives.<sup>56</sup>

✓ In the eighteenth century, full powers gave authority to make a binding agreement, subject to a confirmation which was usually held to be obligatory.<sup>57</sup> Today, full powers give authority merely to discuss, to negotiate and to sign a project, which may or may not become an international treaty by the formal acceptance of it by the States concerned. Ratification is now regarded as ✓ *being* this formal acceptance. It means the ratification of the treaty itself, ✓ although formerly it meant the ratification of the act of an agent in signing it. With such a theory of the nature of ratification, it is impossible to reconcile the doctrine of retroactivity, for the theoretical basis of agency upon which the doctrine rests can no longer be maintained. Diplomatic representatives are no longer regarded as being merely the personal agents of a monarch or head of state. It may be true, from the standpoint of municipal law, that one who signs a treaty acts only as the agent of his monarch or head of state from whom he receives his full powers. ✓ But, from the standpoint of international law, he is an agent not merely of his head of state but of the State itself. In fact, the head of state is today himself an agent of the State in international relations. When he ratifies a treaty, he binds not merely "himself and his heirs," but the legal unit which he represents and which we call the State.<sup>58</sup> He who signs for the State and he who ratifies for the State may then be regarded, in international law, as its agents for different purposes.

<sup>55</sup> Bynkershoek, *Quaestiones juris publici*, 1737, Book II, Chap. 7, § 234; Vattel, *Droit des gens*, 1758, Book II, Chap. 12, § 156; Martens, *Précis du droit des gens*, 1783, Book II, Chap. 2, § 48.

<sup>56</sup> This reservation is to be found in the full powers issued for France, Great Britain and the British Dominions, the United States, Germany, Italy, Poland, the Soviet Union, Belgium, Czechoslovakia. See the examples in Satow, *Diplomatic Practice* (3rd ed.), pp. 79-86, and in Kraus and Rodiger, 1 *Urkunden zum Friedensverträge*, pp. 149-199.

<sup>57</sup> See Satow, *op. cit.*, p. 407. Also the examples of express promises to ratify in eighteenth century full powers at pp. 80-81, and the full powers given by France, Great Britain, and Spain for the Treaty of Paris, 1763, in Martens, 1 *Recueil de traités*, p. 121 *et seq.* Vattel was able to say, "Full powers are nothing else than an unlimited power of attorney" (*Droit des gens, ibid.*, Book II, § 156).

<sup>58</sup> This transformation of legal theory is emphasized by Pound, *Philosophical Theory and International Law*, 1 *Bibliotheca Visseriana*, pp. 75-78. At p. 78 he says: "When sovereignty passed from the sovereign king to the sovereign people, when kings began to reign but not to rule . . . a profound change took place in the facts to which international law was to be applied. . . . Juristically the people as a collective entity took the place of the king."

## THOMAS JEFFERSON ON THE LAW OF NATIONS

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Jefferson's importance as a political theorist tends to be overshadowed by his success as diplomat and statesman. The practical accomplishments of his forty years in public office often obscure the breadth and consistency of the philosophy behind all of his official conduct, and his tremendous influence in formulating and disseminating the principles on which the modern democratic state rests is too often forgotten. His genius consisted, not so much in the originality of his political ideas, as in his ability to select from the conflicting theories of his day all that could be practically applied, and to transmute a diverse intellectual heritage into a working philosophy of the state. Against the sovereign whose command is law, Jefferson sets up a legal theory seeking justice as well as order, and by which ruler and subject are alike bound. It is a theory which transcends national lines, recognizing that isolation, in any rigorous sense, means stagnation and death, both to the individual and to the state. So when Jefferson asks for "peace, commerce, and honest friendship, with all nations—entangling alliances with none,"<sup>1</sup> only the second phrase is negative, and it means no more than it says. Peace and commerce are both relations external to the individual state; and both presuppose for their maintenance some form of international organization—some system of international law. Both Jefferson's writings and his official acts testify to his belief that the intercourse of nations must be governed by some body of legal rules.

The systematic treatment of modern international law begins with the publication in 1625 of the work of Grotius, *De Jure Belli ac Pacis*, which sets forth a code to govern the relations of independent states. It was designed to meet the new problems of a changing political order; and it was based on a natural law theory which had also changed. Natural principles first assumed with Grotius the character of self-evident truths, from which a system of law could be deduced with all the rigor and precision of geometry. They were moral rules, to be sure; but they were rules which followed of necessity from the very construction of the universe.

For the next two centuries the "law of nations" enjoyed a period of optimistic growth, only to be blasted by the Napoleonic wars. A second period of development in international law covers the century between the Congress of Vienna and the fatal shot at Sarajevo; and a third era began with the Treaty of Ver-

<sup>1</sup> First Inaugural Address, Jefferson's Writings, Memorial Edition (Washington, 1903, 20 vols.), III, 321. Unless otherwise noted, all references to Jefferson's works will be to this edition.

sailles. Jefferson's work comes at the close of the first period, formulates the policy of the second, and anticipates some of the doctrines of the third.

The precise form international law took for him was determined in part by his legal and philosophical training, in part by experience in negotiating between nations. "The law of nations . . . is composed of three branches. (1) The moral law of our nature. (2) The usages of nations. (3) Their special conventions."<sup>2</sup> The special conventions of nations are more or less arbitrary, and are made to deal with special conditions as they arise. The usages of nations are rules gradually accumulated, which experience has shown to have utilitarian value. Both may be changed as need for change arises; but neither can transgress the moral law "to which man has been subjected by his creator, and of which his feelings or conscience, as it is sometimes called, are the evidence with which his creator has furnished him." Justice is universal, and is the principle of intercourse between nations as it is between individuals. Hence,

The moral duties which exist between individual and individual in a state of nature, accompany them into a state of society, and the aggregate of all the duties of all the individuals composing the society constitutes the duties of the society towards any other; so that between society and society the same moral duties exist as did between the individuals composing them, while in an unassociated state, and their maker not having released them from those duties on their forming themselves into a nation. Compacts, then, between nation and nation, are obligatory on them by the same moral law which obliges individuals to observe their compacts.<sup>3</sup>

Following the same analogy between men and states, Jefferson admits that in both cases there are circumstances under which contracts may be broken:

When performance, for instance, becomes *impossible*, non-performance is not immoral; so if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation in others. For the reality of these principles I appeal to the true fountains of evidence, the head and heart of every rational and honest man. It is there nature has written her moral laws, and where every man may read them for himself.<sup>4</sup>

Of the degree and imminence of danger on grounds of which contracts may be voided, it is true that

nations are to be judges for themselves; since no one nation has a right to sit in judgment over another, but the tribunal of our conscience remains, and that also of the opinion of the world. These will revise the sentence we pass in our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of rigorous and impartial judges.<sup>5</sup>

In general, "Obligation is not to be suspended till the danger is become real, and the moment of it so imminent that we can no longer avoid decision without forever losing the opportunity to do it."<sup>6</sup>

<sup>2</sup> Official Papers, III, 228.

<sup>3</sup> *Loc. cit.*

<sup>4</sup> *Ibid.*, 228-9.

<sup>5</sup> *Loc. cit.*

<sup>6</sup> *Ibid.*, 230.

The nation is to be held as strictly to the moral code as is the individual. In refusing the offer of a certain "Mr. Hall," a British subject, to turn over to the United States Government "for a price," certain documents of which he was the bearer, Jefferson declared that "moral duties were as obligatory on nations as on individuals, that even in point of interest a character of good faith was of as much value to a nation as an individual and was that by which it would gain most in the long run."<sup>7</sup> So essential does Jefferson believe honesty and fair dealing between nations to be, if the ultimate goal of human happiness is to be achieved, that the conduct of Bonaparte leads him to despair:

The total banishment of all moral principle from the code which governs the intercourse of nations, the melancholy reflection that after the mean, wicked and cowardly cunning of the cabinets of the age of Machiavelli had given place to the integrity and good faith which dignified the succeeding one of a Chatham and Turgot, that this is to be swept away again by the daring profligacy and avowed destitution of all moral principle of a Cartouche and a Blackbeard, sickens my soul unto death.<sup>8</sup>

Since in terms of Jefferson's political philosophy the sanction of any law is the consent of the people, international law will be valid for a given state only to the extent that it is accepted by a majority of the citizens of that state. Treaties, agreements and other special conventions, since they are set up by legally constituted representatives of the people, are coördinate with municipal law, and are as binding on individuals as are local statutes. Any conflict between that part of the law of nations which rests on usage, and the municipal law of a given state, would have to be resolved, on Jefferson's principles, by special agreement, as was done in the consular convention with France of 1788.

## II

It is not to be assumed that Jefferson went so far as to draw up any complete code of international law; he did no such thing. But there was no world tribunal in his day, and the power of the Supreme Court in international cases was limited. Principles were laid down and decisions made by the Department of State; and in his capacity as Secretary, Jefferson passed on a large number of questions of an international nature. It is mainly from his opinions expressed while in that office, together with other official acts and writings, that his theory as it will be reconstructed here is drawn. It is necessarily incomplete according to modern standards, because the number of points he was called upon to settle is insignificant in comparison to the possible extent of the subject matter of international law. The issues he did discuss, however, are most of them fundamental; and his opinions are backed by incisive logic, and wherever possible by the authority of other writers, such as Vattel, Grotius, Pufendorf, Wolff and van Bynkershoek, although he did not hesitate to create new precedent where he found the old not to his taste. Many of Jefferson's decisions were, in fact, new departures in international policy; for he was more

<sup>7</sup> *Anas*, I, 480.

<sup>8</sup> To Duane, Apr. 4, 1813, XIII, 230.

than once called upon to pronounce judgment on questions which had not previously arisen. This is especially true as regards the law of neutrality.

First of all we must note a curious suggestion, for one who holds the law of nature to be universally applicable, to the effect that geographical conditions in America may call for a different code of natural law to govern relations with other nations.<sup>9</sup> Even in international law, Jefferson shows a tendency to break with the older natural law theory in favor of a sociological interpretation, closely resembling Montesquieu's doctrine. This in 1800; and in 1816 he makes use of the "*jus gentium* of America," a principle not wholly unknown on the North American Continent, to claim territory on the Pacific Ocean: "If we claim that country at all, it must be on Astor's settlement near the mouth of the Columbia, and the principle of the *jus gentium* of America, that when a civilized nation takes possession of the mouth of a river in new country, that possession is considered as including all its waters."<sup>10</sup>

This principle did not apply, of course, in the case of Spain's occupancy of the mouth of the Mississippi; for the American claim to the upper waters of the river was well established, which raised another problem. In the dispute with Spain he goes to considerable lengths to prove by the "law of nature and of nations" the doctrine that "different nations inhabiting the same river have all a natural right to an innocent passage along it, just as individuals of the same nation have of a river wholly within the territory of that nation."<sup>11</sup> And from this he deduces further rights:

It is a principle that the right to a thing gives a right to the means, without which it could not be used, that is to say, that the means follow their end. Thus a right to navigate a river, draws to it a right to moor vessels to its shores, to land on them in cases of distress, or for other necessary purposes, etc. This principle is founded in natural reason, is evidenced by the common sense of mankind, and declared by the writers before quoted.<sup>12</sup>

His citations are from Grotius, Pufendorf and Vattel. Needless to say, this argument was lost upon Spain. It was by no means established in that day that riparian states enjoy a right of navigation to the sea through foreign territory. Citizens of Antwerp could not navigate the Scheldt to its mouth, and Spanish subjects themselves could not go down the Tagus past the Portuguese frontier.<sup>13</sup>

Natural law also dictates for Jefferson the right to possess and occupy uninhabited territory. So he argues that a society,

<sup>9</sup> See an unpublished letter to Dr. Mitchell, June 13, 1800, quoted by Chinard, Thomas Jefferson, 398.

<sup>10</sup> To John Melish, Dec. 31, 1816, XV, 94; Cf. Channing, History of the United States, I, 337. <sup>11</sup> To Gallatin, July 4, 1807, XI, 257; Cf. Official Papers, III, 165 ff.

<sup>12</sup> Official Papers, III, 180. He cites Grot. L. 2. c. 2. sec. 15; Puf. L. 3. c. 3. sec. 8; Vat. L. 2. sec. 129.

<sup>13</sup> See Bemis, "Thomas Jefferson," in American Secretaries of State, II, 51; Cf. Channing, *op. cit.*, III, 488.

taking possession of a vacant country, and declaring they mean to occupy it, does thereby appropriate to themselves as prime occupants what was before common. A practice introduced since the discovery of America, authorizes them to go further, and to fix the limits which they assume to themselves; and it seems for the common good, to admit this right to a moderate and reasonable extent.

But the practical situation in which Jefferson found himself forced a still further modification of his principle:

If the country, instead of being altogether vacant, is thinly occupied by another nation, the right of the native forms an exception to that of the newcomers; that is to say, these will only have a right against all other nations except the natives. Consequently, they have the exclusive privilege of acquiring the native right by purchase or other just means. This is called the right of pre-emption, and is become a principle of the law of nations, fundamental with respect to America. There are but two means of acquiring the native title. First, war; for even war may, sometimes, give a just title. Second, contracts or treaty.<sup>14</sup>

This is an excellent example of a theory constructed to support, or to justify, an act already done; for since the United States had already acquired its whole area from the Indians, it must needs be declared right that they should have done so; and since war had frequently been the means, that too must be recognized as giving just title.

The only other important pronouncement of Jefferson's under the head of territory has also to do with Indian lands. The question having been raised as to the expediency of returning to the natives certain lands acquired from them, he denied the power of the government to do so, on the ground that "by the law of nations it was settled that the unity and indivisibility of the society was so fundamental that it could not be dismembered by the constituted authorities, except, 1, where *all power* was delegated to them (as in the case of despotic governments), or, 2, where it was expressly so delegated"; and he found the power in question not to be so delegated in this case.<sup>15</sup>

Jefferson was the first, also, to fix the maritime jurisdiction at a sea league, or three miles, reserving however the right to extend it up to twenty miles if circumstances should warrant. In Grotius and the later writers on international law, the distance had been fixed at a cannon shot from the shore, which was too indefinite to be adequate.<sup>16</sup> The three-mile limit is now universally accepted, and the right of the United States to extend it to twelve miles has not been seriously questioned.

Under the head of individuals, Jefferson expressly recognizes the right of expatriation, presumably following Locke:

My opinion on the right of Expatriation has been, so long ago as the year 1776, consigned to record in the act of the Virginia Code, drawn by

<sup>14</sup> Official Papers, III, 18-19; Cf. *Anas*, I, 340-1.

<sup>15</sup> *Anas*, I, 341.

<sup>16</sup> Cf. Balch, "The United States and the Expansion of the Law between Nations," 64 *Pennsylvania Law Review*, 131.

myself, recognizing the right expressly, and prescribing the mode of exercising it. The evidence of this natural right, like that of our right to life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of reason, but is impressed on the sense of every man. We do not claim these under the charters of kings or legislators, but under the King of Kings. If he has made it a law in the nature of man to pursue his own happiness, he has left him free in the choice of place as well as mode. . . . I believe, too, I might safely affirm, that there is not another nation [except England], civilized or savage, which has ever denied this natural right. . . . How it is among our savage neighbors, who have no law but that of Nature, we all know.<sup>17</sup>

Jefferson, here as elsewhere, is apt to identify his own views with those of his country. The right of expatriation involves the consent of two nations: that which receives the expatriate, and that which relinquishes its claim to his allegiance; and it must therefore be established by treaty. The right was not specifically recognized by the United States until the Act of Congress of July 27, 1868, under which our present treaties were made; and the whole question has not yet been satisfactorily settled.<sup>18</sup>

On the same general ground, he proposes a modification of the fourteen years residence requirement for citizenship. The individual should have perfect freedom to choose the government to which he will give his allegiance. Jefferson would make America a refuge for the oppressed of the world.<sup>19</sup>

Jefferson lays down the principle that the "persons and property of our citizens are entitled to the protection of our government in all places where they may lawfully go."<sup>20</sup> But a citizen residing in a foreign country is under the laws of that country while there. Speaking specifically of England, he adds that, in settling the case of an American citizen, the English judges should keep in mind the law of nations and the treaty of peace, "as making a part of the law of the land."<sup>21</sup> The extent of American jurisdiction over foreign subjects is set forth in the *Notes on Virginia*. Any controversy between foreigners of a nation allied to the United States—an allied nation here means a nation maintaining a resident consul in this country—is to be settled by their consul, or if both choose, by the ordinary courts of justice. If only one of the parties be foreign, the case is under the jurisdiction of the ordinary courts; but if instituted in a county court, may be removed by the foreigner to the general

<sup>17</sup> To Manners, June 12, 1817, XV, 124-5; Cf. to Wendover, Mar. 13, 1815, XIV, 279; Locke, Of Civil Government, II, 118.

<sup>18</sup> Moore, American Diplomacy, 288 ff.; Digest of International Law, III, 552 ff. Some twenty years before Jefferson's statement quoted above was written, and twenty years after the Virginia code referred to, Chief Justice Ellsworth, in *U. S. v. Williams*, had declared: "When a foreigner presents himself here, and proves himself to be of good moral character, well affected to the Constitution and Government of the United States, . . . if he has resided the time prescribed by law, we grant him the privilege of a citizen. . . . But this implies no consent of the government, that our citizens should expatriate themselves." Cf. Brown, Life of Oliver Ellsworth, 257 ff.

<sup>19</sup> First Annual Message, Dec. 3, 1801, III, 338.

<sup>20</sup> Official Papers, III, 244.

<sup>21</sup> To Col. Forrest, Oct. 20, 1784, V, 1.

court, who are to determine it at their first session. "In cases of life and death, such foreigners have a right to be tried by a jury, the one-half foreigners, the other natives." <sup>22</sup>

Provision had been made in the Constitution (Art. IV, sec. 2) for extradition of criminals from one State of the Union to another, but no power was granted for the return of malefactors to foreign countries until Congress passed legislation for this express purpose in 1793. Grotius and Vattel had held that one nation might legitimately request of another the return of fugitives from justice without treaty obligation <sup>23</sup>; but Jefferson maintained, as Secretary of State, that the "delivery of fugitives from one country to another, as practiced by several nations, is in consequence of conventions settled between them, defining precisely the cases wherein such deliveries shall take place." <sup>24</sup> In the absence of adequate precedent, he set forth his own views as to the content of any future agreements his government might make.

The matter of establishing such conventions presents difficulties, if the governments in question vary widely in the substance of their criminal law. <sup>25</sup> Hence, it is necessary for extradition treaties to enter into some detail. In general Jefferson believes a nation has no right to punish a person who has not offended against it, such fugitives being regarded merely as strangers, who have a right of residence unless infectious. Exception is extended to dangerous criminals, namely pirates, murderers and incendiaries. <sup>26</sup>

Piracy he finds already adequately provided for by law, and regards arson as too rare to be taken account of. "The only *rightful* subject then of arrest and delivery, for which we have *need*, is *murder*. Ought we to wish to strain the natural right of arresting and re-delivering fugitives in other cases? . . . The punishment of all real crimes is certainly desirable as a security to society; the security is greater in proportion as the chances of avoiding punishment are less." The fugitive from his country, however, does not escape punishment, but incurs exile, placed by most as next to death. To the foreigner, of course, this is no punishment; but such cases are few, and "laws are to be made for the mass of cases." Jefferson concludes: "The object of a convention, then, in other cases, would be, that the fugitive might not avoid the *difference between exile and the legal punishment of the case*. Now in what case would this *difference* be so important, as to overweigh the single inconvenience of multiplying compacts?" <sup>27</sup> He then goes on to discuss possible cases in the following order:

*Treason* is sufficiently punished by exile, because, though of greatest magnitude when real, most cases of treason are acts against the oppression of a gov-

<sup>22</sup> II, 132. The jury *de medietate lingue* was an English institution, which was rejected by the framers of the American Constitution. It was finally abolished in England in 1870.

<sup>23</sup> See Moore's Digest, IV, 245 ff, for technical discussion of the whole question.

<sup>24</sup> To President Washington, Nov. 7, 1791, VIII, 253-4.

<sup>25</sup> To Gov. Pinckney, Apr. 1, 1792, VIII, 321-2.

<sup>26</sup> See draft of proposed extradition treaties, VIII, 330 ff.

<sup>27</sup> *Ibid.*, 331-2.

ernment rather than against the government itself, and these are virtues. "The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries." For crimes against *property*, the punishment in most countries is highly disproportionate to the crime. "All *excess* of punishment is a crime. To remit a fugitive to excessive punishment is to be accessory to the crime." These crimes, then, are sufficiently punished by exile. *Forgery* deserves more particular notice, but even here the fugitive is punished by exile and confiscation of the property he leaves; "to which add by convention, a civil action against the property he carries or acquires to the amount of the special damage done by his forgery. . . . The *carrying away* of the property of another, may also be reasonably made to found a *civil action*." A treaty or convention, then, could be made, including forgery and the carrying away of property, under the head of *flight from debts*. "To remit a fugitive in this case, would be to remit him in every case. For in the present state of things, it is next to impossible not to owe something. But I see neither injustice nor inconvenience in permitting the fugitive to be sued in our courts."

The principal organ of the state for transacting foreign business is its executive head; in the American state, the President, directly or through his appointees, including the Secretary of State, and ministers and consuls sent to foreign countries. These will deal with similar representatives of the Powers in question. To maintain relations with another government implies a recognition of the legitimacy of that government; and the reception of a minister is, of course, such acknowledgment.<sup>28</sup> Jefferson takes the position, however, that recognition of a government *de jure* is not always necessary to carry on business with it. He writes to Gouverneur Morris, then minister at Paris, in 1792, that

It accords with our principles to acknowledge any government to be rightful, which is formed by the will of the nation substantially declared. The late government was of this kind, and was accordingly acknowledged by all the branches of ours. So, any alteration of it which shall be made by the will of the nation substantially declared, will doubtless be acknowledged in like manner. With such a government *every kind* of business may be done. But there are *some matters* which, I conceive, might be transacted with a government *de facto*; such, for instance, as the reforming the unfriendly restrictions on our commerce and navigation.<sup>29</sup>

This stand is manifestly dictated by expediency, and is another of the instances in Jefferson's career in which the practical man got the better of the theorist.

The tenure of a diplomatic envoy depends on the will of both states involved. "In fact, every foreign agent depends on the double will of the two governments, of that which sends him, and of that which is to permit the exercise of his functions within their territory; and when either of these wills is refused or withdrawn, his authority to act within that territory becomes incomplete."<sup>30</sup>

<sup>28</sup> Official Papers, III, 233.

<sup>29</sup> VIII, 437.

<sup>30</sup> To Genet, Dec. 9, 1793, IX, 264-5.

So long, however, as he remains *persona grata* with the government to which he is sent, the diplomatic agent enjoys certain immunities:

Every person diplomatic *in his own right*, is entitled to the privileges of the law of nations. . . . Among these is the receipt of all packages unopened and unexamined by the country which receives him. The usage of nations has established that this shall liberate whatever is imported *bona fide* for his own use, from paying any duty. A government may control the number of diplomatic characters it will receive; but if it receives them, it cannot control their rights while *bona fide* exercised.<sup>31</sup>

The serving of a process on a diplomatic agent is a breach of privilege.<sup>32</sup>

Jefferson was, nevertheless, not wholly in sympathy with the immunities of the diplomatic code as it related to the lesser officials, or consuls, and even goes so far as to doubt the utility of maintaining consuls at all. In discussing a proposed revision of the consular convention with France, he holds, among other things, that consuls are not immune from giving testimony in the courts under American law;<sup>33</sup> and suggests that "Fewer articles, better observed, will better promote our common interests. As to ourselves, we do not find the institution of consuls very necessary." He thinks them of use only among uncivilized peoples, and finds that

all civilized nations at this day, understand so well the advantages of commerce, that they provide protection and encouragement for merchant strangers and vessels coming among them. So extensive, too, have commercial connections now become, that every mercantile house has correspondents in almost every port. They address their vessels to these correspondents, who are found to take better care of their interests, and to obtain more effectually the protection of the laws of the country for them, than the consul of their nation can.<sup>34</sup>

The suggestion that commercial interests employ their own representatives to carry on the consular functions is entirely consistent with Jefferson's advocacy of individual initiative. It is consistent, too, with *laissez faire* economic theory; and business was already launched on the career that was to lead it in the course of another century to compete with government itself for power and influence. To John Jay, Secretary of State, Jefferson details the changes he has effected in the consular convention with France:

The clauses of the convention of 1784, clothing consuls with the privileges of the law of nations, are struck out, and they are expressly subjected to the laws of the land.

That giving the right of sanctuary to their houses, is reduced to a protection of their chancery room and its papers.

Their coercive powers over passengers are taken away; and over those, whom they might have termed deserters of their nation, are restrained to deserted seamen only.

<sup>31</sup> To Gallatin, Oct. 18, 1805, XI, 91.

<sup>32</sup> To Van Berckel, July 2, 1792, VIII, 385.

<sup>33</sup> To Count de Montmorin, June 20, 1788, VII, 54-5.

<sup>34</sup> *Ibid.*, 60.

The clause, allowing them to arrest and send back vessels, is struck out, and instead of it, they are allowed to exercise a police over the ships of their nation generally.<sup>35</sup>

Of the value of carrying on international transactions by treaty, Jefferson is in the main skeptical, believing that

with nations as with individuals, dealings may be carried on as advantageously, perhaps more so, while their continuance depends on voluntary good treatment, as if fixed by contract, which, when it becomes injurious to either, is made, by forced constructions, to mean what suits them, and becomes a cause of war instead of a bond of peace.<sup>36</sup>

And writing in 1815 to President Madison, Jefferson, speaking of commercial treaties, suggests that "Perhaps, with all of them, it would be best to have but the single article *gentis amicissimae*, leaving everything else to the usages and courtesies of civilized nations."<sup>37</sup>

### III

It is on questions relative to the rights and duties of neutrals that Jefferson's contributions to international law are most significant; for the policy of neutrality declared by Washington in 1793 and carried through by Jefferson in his capacity as Secretary of State, defined these rights and duties more clearly than had ever been done before.<sup>38</sup> His version of the laws of war and neutrality is based on wide experience; for he had been Governor of Virginia during two of the most trying years of the Revolution, had been Secretary of State, and later President during a protracted squabble between France and England, and had been an interested and close observer of the War of 1812. He was much influenced also by Vattel, whose authority in the later eighteenth century was preëminent, and who gives the best account of the law of neutrality. In general, Jefferson's views were, with a few notable exceptions, those upheld by most of the courts of his day, more or less weighted on the side of protection for commercial activity. Indeed, after the War of 1812 had become inevitable, and preparation for hostilities was actually going forward, Jefferson writes to Madison that he is "favorable to the opinion . . . that commerce, under certain restrictions and licenses, may be indulged between enemies mutually advantageous to the individuals, and not to their injury as belligerents."<sup>39</sup> And in his list of "Instructions to the Ministers Plenipotentiary appointed to negotiate Treaties of Commerce with European Nations," the following highly interesting passage occurs:

4. That it be proposed, though not indispensably required, that if war should hereafter arise between the two contracting parties, the merchants of either country, then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart

<sup>35</sup> Nov. 14, 1788, VII, 165; Cf. VII, 171 ff.

<sup>36</sup> To Phillip Mazzei, July 18, 1804, XI, 39.

<sup>37</sup> Cf. Balch, *op. cit.*, 119.

<sup>38</sup> Mar. 23, 1815, XIV, 293.

<sup>39</sup> Apr. 17, 1812, XIII, 140.

freely, carrying all their effects, without molestation or hindrance; and all fishermen, all cultivators of the earth, all artisans or manufacturers, unarmed and inhabiting unfortified towns, villages or places, who labor for the common subsistence and benefit of mankind, and peaceably following their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy, in whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price; and all merchants and traders, exchanging the products of different places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to obtain and more general, shall be allowed to pass free and unmolested.<sup>40</sup>

He carries the same humanity into the actual conduct of war, as far as it is possible to do so. For example, writing to Patrick Henry, his predecessor as Governor of Virginia, in regard to the arrangements made for quartering captured troops, Jefferson recommends that they be treated with all consideration, adding that it "is for the benefit of mankind to mitigate the horrors of war as much as possible."<sup>41</sup> This does not deter him, however, from approving the strict confinement of the British Governor, Hamilton, "on the general principle of national retaliation."<sup>42</sup> His attitude is clearly and vigorously expressed two years later, when he was himself in the Governor's chair. Certain citizens of Virginia, having been taken prisoner when not under arms, and paroled, reported a threat of death if retaken in arms. The incident provoked the following letter, addressed to "Major-General Benedict Arnold, the Commanding Officer of the British force at Portsmouth":

. . . It suffices to observe at present that by the law of nations, a breach of parole (even where the validity of the parole is not questioned) can only be punished by strict confinement.

No usage has permitted the putting to death a prisoner for this cause. I would willingly suppose that no British officer had ever expressed a contrary purpose. It has, however, become my duty to declare that should such a threat be carried into execution, it will be deemed as putting prisoners to death in cold blood, and shall be followed by the execution of so many British prisoners in our possession. I trust, however, that this horrid necessity will not be introduced by you and that you will on the contrary concur with us in endeavoring as far as possible to alleviate the inevitable miseries of war by treating captives as humanity and natural honor requires. The event of this contest will hardly be affected by the fate of a few miserable captives in war.<sup>43</sup>

Since the United States played the part of more or less interested neutral in wars and disputes involving France, England and Spain, Jefferson was called upon to define and defend what he took to be the rights and duties of neutral Powers. His general position is stated as follows:

Reason and usage have established that when two nations go to war, those who choose to live in peace retain their natural right to pursue their

<sup>40</sup> XVII, 23 (May 7, 1784).

<sup>41</sup> Mar. 27, 1779, IV, 54-5.

<sup>42</sup> To Sir Guy Carleton, July 22, 1779, IV, 301 ff.

<sup>43</sup> Mar. 24, 1781, IV, 399-400.

agriculture, manufactures, and other ordinary vocations, to carry the produce of their industry for exchange to all nations, belligerent or neutral, as usual, to go and come freely without injury or molestation, and in short, that the war among others shall be for them as if it did not exist. One restriction on their natural rights has been submitted to by nations at peace, that is to say, that of not furnishing to either party implements merely of war for the annoyance of the other, nor anything whatever to a place blockaded by its enemy.<sup>44</sup>

Jefferson went so far as to hold in a cabinet meeting of the first Washington administration, against the opinions of Hamilton and Knox, that vessels of a belligerent may mount their own cannon in a neutral port; and may recruit their own citizens there. And, further, that a neutral may build and sell vessels to both parties of a quarrel, either in her own ports or by delivering them; denying the contention of Attorney-General Randolph that such ships, if attempt at delivery were made, could be seized as contraband.<sup>45</sup> His stand on this latter point, however, is reversed in the case of arms, although he continued to deny any breach of neutrality. In reply to a protest from the British Ambassador, he writes:

Our citizens have been always free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle, and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations. It is satisfied with the external penalty . . . of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers on the way to the ports of their enemies.<sup>46</sup>

He is clear that impartial justice must obtain in the relations of a neutral to the belligerents; and insists that the United States, as a neutral in the war between France and Great Britain, ought not to permit to one party acts forbidden by treaty to the other, even though the acts themselves are not unlawful. "We cannot permit the enemies of France to fit out privateers in our ports, by the 22nd article of our treaty. We ought not, therefore, to permit France to do it; the treaty leaving us free to refuse, and the refusal being necessary to preserve a fair neutrality."<sup>47</sup> And the same attitude prevails in his opinion as to the legality of troops of a belligerent marching across the territory of a neutral. When the question arose in the dispute between England and Spain over the possession of Nootka Sound, it seemed highly probable that the British would seek to move troops from Canada over American territory; so Jefferson writes: "It is well enough agreed, in the laws of nations, that for a neutral power to give or refuse permission to the troops of either belligerent party to pass through their territory, is no breach of neutrality, provided the

<sup>44</sup> To Thos. Pinckney, Sept. 7, 1793, IX, 221-2.

<sup>45</sup> *Anas*, I, 372-3; 379.

<sup>46</sup> To George Hammond, May 15, 1793, IX, 90-1.

<sup>47</sup> *Official Papers*, III, 248.

same refusal or permission be extended to the other party.”<sup>48</sup> But in applying the doctrine, he is guided by principles of expediency, expressing his willingness to grant the permission lest, if it be refused, the troops would march without it, and his government should stand committed. “For either we must enter immediately into the war, or pocket an acknowledged insult in the face of the world; and one insult pocketed soon produces another.” He believes a still more desirable middle ground would be to avoid giving an answer at all.

Blockade and contraband of war are the only two articles in the rights of neutral nations which war can abridge,<sup>49</sup> and Jefferson is inclined to doubt the ultimate validity of the principle of contraband. His views on the question change sufficiently, however, to render his position confusing. In July, 1793, he believes “it cannot be doubted, but that by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize”;<sup>50</sup> but in December of the same year he has virtually reversed his position, declaring the natural principle to be, as in the above passage, that *goods follow the owner*, but explaining that the “inconvenience of this principle in subjecting neutral vessels to vexatious searches at sea, has . . . rendered it usual for nations to substitute a *conventional* principle that *the goods shall follow the bottom*.”<sup>51</sup> Still later, in 1801, he is no longer even convinced that natural law dictates the principle that goods follow the owner, holding in substance that the practice of taking the goods of an enemy from the ship of a friend, though sanctioned by the usage of nations, is not so by the law of nature. He now believes that national morality has never sanctioned the seizure of enemy goods in friendly territory; and the ship of a friend is to be regarded as his territory when on the high seas just as much as though in his harbor. “We . . . perceive no distinction between the movable and immovable jurisdiction of a friend, which would authorize the entering the one and not the other, to seize the property of an enemy.”<sup>52</sup> He then goes on to justify the doctrine:

It may be objected that this proves too much, as it proves you cannot enter the ship of a friend to search for contraband of war. But this is not proving too much. We believe the practice of seizing what is called contraband of war, is an abusive practice, not founded in natural right. War between two nations cannot diminish the rights of the rest of the world remaining at peace.<sup>53</sup>

#### IV

There are ways of settling the disputes of states less destructive and inhuman, and in the long run more effective than war, which is in fact the last resort, after other means of securing justice and safety have failed.<sup>54</sup>

<sup>48</sup> Official Papers, III, 80; Cf. Bemis, *op. cit.*, 40 ff.

<sup>49</sup> To B. Stoddart, Feb. 18, 1809, XII, 250.

<sup>50</sup> To Genet, July 24, 1793, IX, 170.

<sup>51</sup> Dec. 20, 1793, XVII, 348 ff; Cf. Randall, *Life of Jefferson*, II, 670 ff.

<sup>52</sup> To Livingston, Sept. 9, 1801, X, 277 ff.

<sup>53</sup> *Ibid.*, 280.

<sup>54</sup> To Sir John Sinclair, June 30, 1803, X, 397.

"Friendly nations always negotiate little differences in private. Never appeal to the world but when they appeal to the sword."<sup>55</sup> Arbitration of international disputes was barely known in Jefferson's day, the first modern arbitration agreement being that embodied in Jay's treaty of 1794;<sup>56</sup> but he fully appreciated the value of the judicial settlement there involved, as against the merely advisory function covered by mediation. The authority of reason, he declares, is "the only umpire between just nations."<sup>57</sup>

Although Jefferson could prosecute a war with vigor when it could not be avoided, he was tireless in his efforts to make it at least less frequent, and when it had become inevitable to render it as humane as possible. He writes in 1817:

Of my disposition to maintain peace until its condition shall be made less tolerable than that of war itself, the world has had proofs. . . . I hope it is practicable, by improving the mind and morals of society, to lessen the disposition to war; but of its abolition I despair. Still, on the axiom that a less degree of evil is preferable to a greater, no means should be neglected which may add weight to the better scale.<sup>58</sup>

War is a terrible thing, and it must not be waged for petty causes. Jefferson offers a *reductio ad absurdum* in opposing the use of force to restrain the *Little Sarah*, a French prize fitted as a privateer in Philadelphia, "Because I would not gratify the combination of kings with the spectacle of the two only republics on earth destroying each other for two cannon."<sup>59</sup> He went the length, also, of proposing a union of Powers for the preservation of peace, when he suggested concerted action on the part of the states whose commerce suffered at the hands of the Barbary pirates, to maintain a police force in the Mediterranean.<sup>60</sup> World opinion, however, was not prepared for that form of coöperation, and the question was only settled by a series of wars, carried on individually by the interested nations.

When negotiation and arbitration fail, there are still compulsions that may be exercised without resorting to arms, and no one ever made better use of them than did Thomas Jefferson. He fully comprehended the value of economic pressure, and the tremendous force of "peaceable coercions." "War is not the best engine for us to resort to. Nature has given us one in our commerce, which, if properly managed, will be a better instrument for obliging the interested nations of Europe to treat us with justice."<sup>61</sup> Still earlier, in March, 1793, when there seemed danger that cargoes would be refused entry into her ports by the enemies of France, Jefferson had written apropos the possible convening of Congress to consider the question of war:

<sup>55</sup> *Anas*, I, 381.

<sup>56</sup> Balch, *op. cit.*, 132.

<sup>57</sup> Fifth Annual Message, Dec. 3, 1805, III, 387.

<sup>58</sup> To Noah Worcester, Nov. 26, 1817, XVIII, 298-9.

<sup>59</sup> *Anas*, I, 368; Cf. Randall, II, 157 ff.

<sup>60</sup> Proposals, etc., XVII, 145 ff, Nov. 1786; Cf. to Adams, July 11, 1786, V, 364 ff; to Monroe, Aug. 11, 1786, V, 385-6; Autobiography, I, 97 ff.

<sup>61</sup> To Pinckney, May 29, 1787, IX, 389-90; Cf. to Livingston, Sept. 9, 1801, X, 281-2; to Paine, Mar. 18, 1801, X, 223; to Logan, Mar. 21, 1801, VIII, 23 (Ford ed.).

But I should hope that war would not be their choice. I think it will furnish us a happy opportunity of setting another precious example to the world, by showing that nations may be brought to do justice by appeals to their interests as well as by appeals to arms. I should hope that Congress, instead of a denunciation of war, would instantly exclude from our ports all the manufactures, produce, vessels and subjects of the nations committing this aggression, during the continuance of the aggression, and till full satisfaction is made for it. This would work well in many ways, safely in all, and introduce between nations another umpire than arms. It would relieve us, too, from the risks and the horrors of cutting throats.<sup>62</sup>

It is to be noted here that the embargo during Jefferson's administration proved a tremendously powerful weapon, and had the government been strong enough to secure its more rigid enforcement, might have prevented the War of 1812. Recent researches in the French and British archives of the period reveal that it was far more effective than either its friends or its enemies realized at the time.<sup>63</sup>

The modern notion of arms limitation is another device for maintaining peace with which Jefferson was entirely familiar. In the negotiations with England over the fortifications on the Canadian line, Hammond, the British Ambassador, had proposed an Indian buffer state between the two countries.<sup>64</sup> Jefferson countered with a proposal for limitation of armaments along the border; and Hammond ultimately offered a proposition to eliminate the forts entirely, to which Jefferson agreed with some enthusiasm.<sup>65</sup> The plan did not immediately bear fruit, but its monument today is a three-thousand-mile unfortified frontier.

Another means of compulsion is retaliation. Jefferson holds, therefore, that while commerce ought to be free from every obstruction, if one nation erects barriers against another, such, for example, as tariff laws, that other must retaliate.<sup>66</sup> A nation has a right, also, to demand adequate satisfaction for injury sustained at the hands of another, but "to demand satisfaction *beyond* what is adequate is wrong."<sup>67</sup> This policy in the hands of John Hay a century later, fully demonstrated the truth of Jefferson's assertion that a nation, "by establishing a character for liberality and magnanimity, gains in the friendship and respect of others more than the worth of mere money."<sup>68</sup>

After ample cause for war has arisen, Jefferson would still not be too precipitate in entering a conflict. In regard to the seizure of the *Chesapeake* by the British, and other acts of aggression, he writes:

<sup>62</sup> To Madison, Mar. 1793, IX, 34.

<sup>63</sup> Sears, *Jefferson and the Embargo*, preface, *et passim*. Cf. Hirst, Thomas Jefferson, 441 ff, for a concurring English view. For critics of the embargo, see Henry Adams, *History of the United States*, Vol. 4; Allen Johnson, *Jefferson and His Colleagues*, Chap. 8.

<sup>64</sup> Bemis, *op. cit.*, 30.

<sup>65</sup> Cf. Sears, *op. cit.*, 40-1.

<sup>66</sup> To W. W. Seward, Nov. 12, 1785, V, 203.

<sup>67</sup> Official Papers, III, 249.

<sup>68</sup> *Ibid.*, 406.

We act on these principles, 1. That the usage of nations requires that we shall give the offender an opportunity of making reparation and avoiding war. 2. That we should give time to our merchants to get in their property and vessels and our seamen now afloat. And 3. That the power of declaring war being with the Legislature, the executive should do nothing, necessarily committing them to decide for war in preference to non-intercourse, which will be preferred by a great many.<sup>69</sup>

The theory of the social contract which Jefferson advanced assumed the state of nature to be a state of peace, and in international affairs he sought to preserve this fundamental pacificism by every means in his power. If he never conceived, as Kant so clearly did,<sup>70</sup> a pacific world-order based on a league of states, it was, perhaps, because the America of his day was too remote from Europe to make such a plan appear as within the range of possibility. Then, too, Kant had adopted Hobbes' conception of the pre-social state as a war of each against all, in which peace could be preserved only by agreement to preserve it backed by force; and had reasoned from analogy to postulate a similar agreement among national states. For Jefferson, peace was the natural, war the artificial state of man. If Kant's vision was of a world federation, in which war would not be tolerated, Jefferson's ideal was of a world democracy, in which cause for war would never arise.<sup>71</sup>

<sup>69</sup> To Clinton, July 6, 1807, XI, 258; Cf. to Bidwell, July 11, 1807, XI, 272.

<sup>70</sup> *Zum Ewigen Frieden.*

<sup>71</sup> Cf. Henry Adams, *op. cit.*, I, 146-7.

## EDITORIAL COMMENT

### PHILIPPINE NEUTRALIZATION

The problem of neutralization is brought forward under somewhat new conditions in the Act of Congress of the United States approved March 24, 1934, and providing for the independence of the Philippine Islands. This Act was accepted by a concurrent resolution of the Philippine Legislature of May 1, 1934. Section 11 of the Act is as follows:

The President is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved.

Considerable discretion is left to the President in this section of the Act, which is identical in its terms with the same section of the Act of January, 1933.

It is evident from Section 12 of the Act that this neutralization, if agreed upon, is not regarded as impairing in any degree the independence of the Philippine Islands, nor is independence conditioned on neutralization. While just what States are to be approached in the negotiations for neutralization is not stated, it may be implied from Section 12 that it would be the Powers "with which the United States is in diplomatic correspondence," as they are to be invited "to recognize the independence of the Philippine Islands." Many of the Powers "with which the United States is in diplomatic correspondence" would obviously have only remote interest in Philippine independence, or even in the neutralization of the Philippines.

Neutralization has often been a measure to which resort was had when a State or States might be uncertain as to an immediate settlement or unable to make a satisfactory settlement of a problem. Section 11 by providing for a "treaty for the perpetual neutralization of the Philippine Islands," introduces an idea which has been common in neutralization treaties. In some treaties the words "forever," "always," or "lasting," or several of these words, have been used.

In the Treaty of Vienna, 1815, "the town of Cracow, with its territory, is declared to be forever a free, independent, and strictly neutral city" and "the Courts of Russia, Austria, and Prussia engage to respect, and to cause to be always respected, the neutrality of the free town of Cracow and its territory." The Congress of Vienna also "acknowledged that the general interest demands that the Helvetic States should enjoy the benefit of a perpetual neutrality." In spite of this action, Switzerland made known in subsequent periods of war that she would maintain her neutrality "by all the means in her power."

By the Treaty of 1831 it was provided that Belgium "shall form an inde-

pendent and perpetually neutral state." Subsequent treaties reaffirmed this principle.

The City of Cracow, which was under the Treaty of 1815 to be forever a "strictly neutral city," was annexed to Austria in 1846, thus giving the words "forever" and "always" an unduly restricted meaning of 31 years.

Switzerland has stated that her "neutrality and inviolability" rested to a considerable degree upon her ability to "maintain and defend" the "integrity of her territory."

The Treaty of 1867, providing for the perpetual neutrality of the Grand Duchy of Luxemburg, was held by some of its negotiators to be one of "limited liability" which could call merely for "collective action" but in which no one of the Powers may "be called upon to act singly or separately."

In the Franco-Prussian War, Great Britain negotiated treaties with Prussia and with France which declared "that if France (Prussia) should violate Belgian neutrality she will coöperate with Prussia (France) for its defense," and this treaty was to remain in effect for a year from the treaty of peace.

It is evident that a treaty of neutralization with no sanction is not an ample guarantee of the security of the neutralized area. Even Mr. Gladstone, speaking in 1870 in reference to the British action in regard to Belgium, said that he was unable to subscribe to the doctrine that "the simple fact of the existence of a guarantee is binding on every party to it, irrespectively altogether of the particular position in which it may find itself at the time when the occasion for acting on the guarantee arises," and he further said that the great authorities to whom he had been accustomed to listen never "took that rigid and, if I may venture to say so, that impracticable view of a guarantee." Subsequent events seem to have supported Gladstone's opinion.

The "perpetual neutralization of the Philippine Islands" for which provision is made in the Act of March 24, 1934, may or may not involve any of the problems of previous attempts at neutralization, but it is evident that mere words may not be sufficient for the realization of the ends sought.

GEORGE GRAFTON WILSON

#### PHILIPPINE INDEPENDENCE

There are several aspects of the Tydings-McDuffie Act of March 24, 1934,<sup>1</sup> providing "for the complete independence of the Philippine Islands" which attract the attention of international lawyers. Some of them are provocative of considerable discussion, to which this comment may serve as a signpost but not as a solution. Others are perhaps of equal or greater general importance but will not be considered here.<sup>2</sup>

In the first place it should be noted that this act in general follows the

<sup>1</sup> Public No. 127, 73d Congress.

<sup>2</sup> The economic effects are considered in the Bulletins of the American Council, Institute of Pacific Relations, Vol. III, Nos. 19 and 20, Oct. 5 and 19, 1934.

scheme of the Hare-Hawes-Cutting Act which was passed over the President's veto on January 17, 1933, and which was rejected by the Philippine Legislature.<sup>3</sup> The new act was accepted by that Legislature on May 1, 1934. It retains the general scheme of a ten-year interim period preliminary to complete independence, the system of free import quotas, graduated Philippine export taxes after the fifth year, and restriction on immigration from the islands to the United States.

In ratifying the Peace Treaty of Paris in 1899 the Senate adopted a resolution disavowing an intention to annex the Philippine Islands permanently. The United States was already committed to the independence of Cuba. In Cuba we exercised control for a time under a military government. By the famous Platt Amendment to the Army Appropriation Bill of 1901, the Congress laid down the provisions which should "substantially" be incorporated in a Cuban constitution before Cuban independence was recognized. The Philippine Independence Act in Section 2 similarly outlines, but in greater detail, the provisions which must be incorporated in the new Philippine constitution and, before complete independence is assured, the President of the United States must find that "the proposed constitution conforms substantially with the provisions of this act." In the case of Cuba, however, the adoption of an appropriate constitution was a sufficient prerequisite to the recognition of the independence of the new state; in the case of the Philippines, there is to be an interim period of ten years during which there will exist a "Commonwealth of the Philippine Islands," the relations of which to the United States are in some respects similar to those of the Dominions to the British Empire during some stages of their progression toward statehood.

There are further similarities between the Platt Amendment and the Philippine Act.<sup>4</sup> Article II of the Platt Amendment limited the capacity of Cuba to contract foreign debts; paragraph 6 of Section 2 (a) of the Philippine Act contains like restrictions. It is interesting to compare the exact language of Article 3 of the Platt Amendment and paragraph 14 of Section 2 (a) of the Philippine Act:

*Platt Amendment*

III. That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to

*Philippine Act*

(14) The United States may, by Presidential proclamation, exercise the right to intervene for the preservation of the government of the Commonwealth of the Philippine Islands and for the maintenance of the government as provided in the constitution thereof, and for the protection of life, property, and

<sup>3</sup> This act is analyzed in Foreign Policy Reports, Vol. IX, No. 22, Jan. 3, 1934.

<sup>4</sup> Some of the similarities between the Platt Amendment and the Philippine Act of 1933 are pointed out by the Honorable F. C. Fisher, former Associate Justice of the Supreme Court of the Philippine Islands, in an article entitled "The Status of the Philippine Islands under the Independence Act," American Bar Association Journal (1933), Vol. XIX, p. 465.

Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

individual liberty and for the discharge of government obligations under and in accordance with the provisions of the constitution.

In this connection, along with paragraph 14 of Section 2 (a) should be read paragraph 4 of Section 2 (b):

That the government of the Philippine Islands, on becoming independent of the United States, will assume all continuing obligations assumed by the United States under the treaty of peace with Spain ceding said Philippine Islands to the United States.

Article 4 of the Platt Amendment provided for the ratification and validation of all acts of the United States and rights acquired thereunder. Under Section 2 (b), paragraphs 1 and 3, there are similar safeguards, to become effective upon the complete independence of the Philippines.

Article 7 of the Platt Amendment assured to the United States the acquisition of coaling and naval stations. The 1933 Philippine Act had provided that when the sovereignty of the United States was finally relinquished all military and other reservations of the United States in the islands should be transferred to the new government except such as the President of the United States should "re-designate" within two years after his proclamation of withdrawal. This provision would have left the United States free to retain all, some or none of these reservations. Under Section 5 of the new act, all military and naval reservations are retained by the United States during the Commonwealth period, but upon the proclamation of independence only the naval and fueling stations are reserved (Section 10 (a)). With respect to these, the President is "authorized and empowered" under Section 10 (b) "to enter into negotiations with the government of the Philippine Islands, not later than two years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement the matter of naval reservations and fueling stations shall remain in its present status."

Article 8 of the Platt Amendment and Section 2 (b), paragraph 5, of the Philippine Act are almost identical:

*Platt Amendment*

VIII. That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

*Philippine Act*

(5) That by way of further assurance the government of the Philippine Islands will embody the foregoing provisions (except paragraph (2)) in a treaty with the United States.

The paragraph (2) referred to in the Philippine Act deals with the election and service of officials of the Philippine Government.

During the Commonwealth period, "Foreign affairs shall be under the di-

rect supervision and control of the United States" (Section 2 (a), paragraph 10).<sup>5</sup>

The phraseology of Section 10 (a) of the Philippine Act has other points of interest. On the 4th of July immediately following the expiration of the ten-year Commonwealth period, the President of the United States "shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or [*sic*] sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands," subject to the proviso on naval bases, "and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation . . ." It may be noted that by Article I of the Treaty of Paris, Spain "*relinquishes* all claim of sovereignty over and title to Cuba." With reference to recognition, Section 12 of the act further provides:

Upon the proclamation and recognition of the independence of the Philippine Islands, the President shall notify the governments with which the United States is in diplomatic correspondence thereof and invite said governments to recognize the independence of the Philippine Islands.

The application of the immigration laws of the United States to the Philippine Islands during the Commonwealth period is interesting, but will not be gone into here. It may be noted, however, that Section 8 (a), paragraph 3, of the act provides that "Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer . . . during which assignment such officer shall be considered as stationed in a foreign country" although his activities are confined to the performance of duties connected with the administration of the immigration laws. Under this authority, Vice-Consul Henry B. Day has been assigned as the officer in charge of the new American Consulate at Manila, and thus becomes, it is believed, the first United States consular officer ever to exercise consular functions in United States territory. His commission invests him "with all the privileges and authorities of right appertaining to that office" but "subject to the conditions prescribed by law." Although Article 1, paragraph 27, of the United States Consular Regulations as in force January 11, 1932, contemplates the description of the consular district in the commission, no such description is here made. It is understood to extend to all the Philippine Islands. Mr. Day does not function under an exequatur, but was instructed to report to the Governor General for authorization to act in lieu thereof. It is understood that he has received no authorization from the Philippine Government.<sup>6</sup>

<sup>5</sup> In discussing this and other provisions of the 1933 Act, Judge Fisher, in the article cited above, concludes that during the Commonwealth period the Philippine Government will be in a state of "semi-sovereignty."

<sup>6</sup> Information supplied to the writer by the Department of State.

From the point of view of international politics, the relinquishment of the Philippines is an event of capital importance. According to some British opinion,<sup>7</sup> it means the withdrawal of the United States to Hawaii and the abandonment of our position as a power in the Far East, with the result that the British navy would be left alone as a counterweight to the rapidly increasing power of Japan, whose attitude on her naval position in the East has recently been made abundantly clear at London. This change is more apparent than real.<sup>8</sup> Even before the limitations on fortifications imposed by Article XIX of the Washington Naval Treaty, a considerable weight of naval opinion in the United States held that we could not retain the Philippines in the face of a hostile attack. Even if this were not the case, the provisions of the Philippine Act do not automatically alter our naval position in the islands, even at the end of the ten-year period. However, Section 11 of the act contains a highly important provision:

The President is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved.

Apparently these negotiations need not wait upon the termination of the ten-year Commonwealth period.<sup>9</sup> It is probable that they will play an important part in any future naval conference dealing with affairs in the Pacific. They may play as important a part as the agreement to limit fortifications played in 1922 at the Washington Conference. If they result in placing the islands under a demilitarized régime guaranteed by all the Pacific Powers, they may free the United States from some of the false bases on which our recent naval policy has been popularly supported.<sup>10</sup>

PHILIP C. JESSUP

#### THE COMPLAINT OF YUGOSLAVIA AGAINST HUNGARY WITH REFERENCE TO THE ASSASSINATION OF KING ALEXANDER

King Alexander of Yugoslavia and M. Louis Barthou, the French Minister of Foreign Affairs, were assassinated in Marseille on October 9, 1934, while the former was paying an official visit to the French Republic. The assassin died from wounds received in the *melée*, but was promptly identified

<sup>7</sup> See the views of the Marquess of Lothian in the *London Observer*, as quoted in the *New York Times*, Nov. 18, 1934. Cf. Sir Frederick White, "The Philippines as a Pawn in the Game," *Pacific Affairs*, Vol. VII (1934), p. 163.

<sup>8</sup> Cf. Quincy Wright, "A Pawn Approaches the Eighth Square," *ibid.*, p. 326.

<sup>9</sup> As far back as 1911, Mr. Cyrus French Wicker discussed the neutralization of the Philippines, concluding that this could be accomplished without a relinquishment of sovereignty. *Neutralization*, p. 81 ff.

<sup>10</sup> The recommendations of the Committee on the Philippines sponsored by the Foreign Policy Association and the World Peace Foundation state: "From the strategic standpoint, the majority of the Committee regards the possession of the Philippines by the United States as a definite liability." *Foreign Policy Committee Reports No. 2*, January, 1934, p. 5.

and certain of his accomplices were arrested in France. Investigations carried on in France and elsewhere soon thereafter, indicated that the crime may have been committed as part of a political plot against the king and government of Yugoslavia in order to further certain designs in respect to Croatia and other districts made part of Yugoslavia, formerly the Serb-Croat-Slovene State, by the treaties of Saint-Germain-en-Laye. These districts formerly constituted a part of the Kingdom of Hungary within the Austro-Hungarian Monarchy.

Whether the alleged plot was participated in by persons acting with the active support or with the knowledge and connivance of responsible Hungarian officials and the extent to which such support, if any, was given, are questions of fact of a deeply controversial nature with which we are not here concerned. The facts must be investigated by some impartial body before proper conclusions may be drawn. As a result of the controversy, political tension between Hungary and Yugoslavia became intensified, and on November 22, 1934, Yugoslavia invoked Article XI, Paragraph 2, of the Covenant, in a note presented to the Council of the League of Nations, followed by a lengthy memorandum of particulars relating to prior events. The note specifically accused Hungary of complicity in the crime, and asked the League to investigate "this situation, which seriously compromises relations between Yugoslavia and Hungary, and which threatens to disturb the peace and good relations between nations." At the same time, Czechoslovakia and Roumania associated themselves with Yugoslavia in identic notes in which they referred to the "exceptional gravity" of the facts referred to, as being of direct concern to both these countries in their "neighborly relations with Hungary, which are thus endangered as well as the general conditions upon which the peace of Central Europe depends."

It will be observed that the complaint was presented under the second paragraph of Article XI, which declares it to be "the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstances whatever affecting the international relations which threaten to disturb international peace or the good understanding between nations upon which peace depends." It is significant that the three complainants did not invoke the first paragraph of Article XI, which speaks of "any war or threat of war," whether affecting any of the members of the League or not, and contemplates the taking of "action (*mesures*) that may be deemed wise and effectual to safeguard the peace of nations." It is therefore fair to assume that notwithstanding the sharp tone of the note and the recrudescence of national feeling which has been aroused on both sides, the proceeding itself was compatible with the desire to clear the air in Central Europe by bringing all the facts and circumstances surrounding the crime to the knowledge of the world and perhaps thereby leading to a better moral basis of international relationship among the nations affected. Indeed, the reply of Hungary to the League on November 24, 1934, expressed the desire

that the Council should immediately take the matter under consideration, so that the Government of Hungary should not be unjustly made responsible "for the odious crime of Marseille," emphasizing that delay would be dangerous because the political atmosphere thus created was "capable of affecting even the peace of the world." The reply denied complicity and maintained that Hungary had merely granted a right of asylum to refugees.

The peace of nations has often been endangered by assassinations and other terroristic acts committed by individuals closely associated with political groups acting with the connivance or knowledge of a foreign government. The Soviet Government has frequently been accused of fomenting disorder abroad through the Third International. The assassination of Chancellor Dollfuss was attributed by Austria to the activities of the German National Socialistic Party.

The extent to which a government is responsible for preventing or repressing subversive or revolutionary activity by persons or groups within its territory directed against the peace and order of a foreign state, is not well settled in international law. It has been said that treason is not an international crime. Certainly the lack of any general agreement and practise upon the subject represents one of those *lacunae* which one would least expect to find. An international community of states, wherein each was insistent upon the maintenance of its own sovereignty and wherein the equality of each was recognized as axiomatic, would be likely to develop a mutual obligation to suppress subversive acts directed against a friendly foreign nation. Vattel indeed asserted such a principle derived from a mutual duty to promote justice between nations: "If a sovereign who has the power to see that his subjects act in a just manner permits them to injure a foreign nation, either the state itself or its citizens, he does no less a wrong to that nation than if he injured it himself."<sup>1</sup>

The legislation of some of the European countries, however, is based rather upon the desire to avoid foreign complications by unauthorized acts of private persons than upon any recognized obligation towards other states. Thus the French Penal Code (Arts. 84 and 85) provides that a person shall be liable to punishment who, by a hostile act not approved by the government, has exposed the state to a declaration of war, or the state or a French citizen to reprisals. The German Penal Code (Art. 102), on condition of reciprocity, makes punishable an act committed against a foreign state which would be punishable as treason if committed against the Reich. The Italian Penal Code (Art. 113) contains a general clause making liable to punishment a person who disturbs the friendly relations between the Italian Government and a foreign state.

The legislation of Great Britain and the United States contains nothing upon this subject as broadly phrased as the statutes to which we have just

<sup>1</sup> Vattel, Law of Nations, Bk. II, Chap. VI, s. 72, Fenwick's translation, Classics of International Law, p. 136.

referred. The duty of the state to prevent subversive acts planned or being committed against a foreign state, is restricted to obligation under the laws of neutrality in relation to an actual or impending civil war. Political plots generally are made punishable in Great Britain and in United States only if such acts amount to making the national territory a base for a "military or naval expedition" against a friendly state.<sup>2</sup>

Even where the statutes appear to be adequate on their face, the real protection lies in their enforcement through exercise of the general police powers of the state. Where the system of government is in law or in fact dictatorial, the letter of the statute is impotent. The fact that such legislation is often made subject to the condition of reciprocity, indicates that it does not result from a positive rule of international law. Lauterpacht says: "International law flowing from international solidarity cannot mean that a state is bound to prevent anything which constitutes a danger to foreign states."<sup>3</sup> The complaint of Yugoslavia, however, is much more specific in that it alleges that "the assassination was organized and executed with the participation of those terrorist elements which had taken refuge in Hungary and which have continued to enjoy the same connivance in that country as previously, and it is only thanks to this connivance that the odious Marseille outrage could have been perpetrated."

One cannot but be struck by the remarkable resemblance of the present accusation to that brought *against* Serbia after the assassination of the Archduke Franz Ferdinand and his wife at Sarajevo on June 28, 1914. It was then asserted by the ally of Austria-Hungary that the plot to take the life of the Archduke was planned and promoted in Belgrade with the cooperation of official Serbian individuals, and that "the ultimate object of these policies was to revolutionize gradually, and finally to bring about a separation of the southwestern region of the Austro-Hungarian Monarchy from that empire and unite it with Serbia."<sup>4</sup> The danger to the peace of the world lay then with the fact that both sides were receiving the support of other Powers, and that the dispute could not be limited to the parties directly affected. The present situation does not differ materially in this respect, as it is probable that Italy will support the position of Hungary. In 1914, however, the issue could not be presented in one place before representatives of the nations both directly and indirectly affected. In 1914, an atmosphere of acrimony remained throughout, leading eventually to war. The existence of the League of Nations and the competence directly conferred upon it to hear the accusations and counter-accusations in a neutral

<sup>2</sup> British Foreign Enlistment Act, Secs. 11-12; United States Act of March 4, 1909, as amended June 15, 1917, Sec. 8. For the cases, see Lauterpacht, this JOURNAL, Vol. 22 (1928), pp. 113-116.

<sup>3</sup> *Ibid.*, p. 129. See also L. Preuss in this JOURNAL, Vol. 28 (1934), p. 649.

<sup>4</sup> German White Book as translated in the Supplement to this JOURNAL, Vol. 8 (1914), p. 372.

approach, make the impasse of 1914 differ materially from the comparable situation of 1934. On the other hand, some factors are not so favorable. Nationalism has increased since the World War. The number of sovereignties has augmented and the multiplication of national boundaries in Central Europe has added to the danger of permitting nationalistic activism to be carried on under the guise of individual initiative. There is also a corollary brought out by the reply of Hungary, that such initiative, original or vicarious, is often the natural result of the oppression of minorities whose allegiance has been changed by the transfer of territory.

It would be futile to attempt to settle responsibility for the assassination of King Alexander under any purely legalistic procedure. The real issue is not whether a state is *obligated* to suppress activity subversive of the order of a foreign state, but whether it values peace with its neighbors sufficiently to *wish* to control within its jurisdiction acts which endanger good relations and to which it would object if committed against itself.

That the dispute involved much more than the determination of any international legal responsibility in connection with the assassinations was promptly demonstrated when the matter was brought up in the session of the Council on December 8, 1934. In the meantime, certain alleged mass expulsions carried on by Yugoslavia, of Hungarians settled near the border, exacerbated an already tense situation. The discussions at Geneva then assumed a character widely divergent from the immediate issue and involving questions going back to the peace settlements of 1919. Without the active participation of the great Powers, especially of France, Great Britain and Italy, a peaceful solution might have been difficult. The French Foreign Minister, M. Laval, proposed action by the Council, not upon Article XI under which the complaint was filed, but upon Article X, by which the members of the League "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League," and by which, in case of any such aggression or "any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled." Acting under this article, a resolution was unanimously adopted on December 10, 1934, presented by Captain Anthony Eden, British Lord Privy Seal. The resolution, besides insisting that all those responsible for the "odious crime" shall be punished, recalls:

That it is the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose;

That every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to governments which request it.

The Council called upon Hungary to take at once appropriate punitive action in the case of its authorities whose culpability may have been established and to communicate to the Council the measures it takes to this effect.

More far-reaching than all of these steps, however, because dealing not merely with a contemporary problem but also with a possible future development of international legal relations, is the decision to set up a committee of experts to study the question with a view to drawing up a preliminary draft of an international convention to assure the repression of conspiracies or crimes committed with political and terrorist purpose. The committee is to be composed of ten members, one each from the governments of Belgium, France, Great Britain, Hungary, Italy, Poland, Rumania, the Soviet Union, Spain and Switzerland. To this committee is referred the plan already presented by the French government for a Permanent International Penal Court, and to it are to be presented any other suggestions which other governments may wish to make.

The League has thus definitely averted a crisis by obtaining the recognition of obligations heretofore only vaguely defined. In so doing it is entitled to great credit, much of which is due not only to the constructive statesmanship of the representatives of France, Great Britain, Italy and other countries not immediately involved, but also to the restraint of the nations directly parties to the issue. An untrodden field in positive international law has been opened up to which even non-members of the League might well give earnest attention with a view to official coöperation.

ARTHUR K. KUHN

THE BUDAPEST RESOLUTIONS OF 1934 ON THE BRIAND-KELLOGG PACT OF PARIS \*

At its 38th Conference in Budapest, September 6-10, 1934, the International Law Association placed on record its willingness to take account of current developments in its approach to international law, and expressed its determination to see the international law of the twentieth century shaped with reference to twentieth century conditions. When the Association met at Oxford in 1932, the report of its Neutrality Committee was severely criticized. Professor J. L. Brierly found the committee's draft conventions "based on a notion of the relations between neutrals and belligerents which was all right in 1899 and 1907 at the Hague Conferences, which was all right, possibly, as late as 1913, but which in 1932 belongs to an utterly outlawed order of ideas."<sup>1</sup> Dr. Arnold D. McNair asked, "Is it right at this stage of the world's history that this body should do anything to crystallize a conception of neutrality which most of us regard as completely out of order?"<sup>2</sup>

Following the meeting at Oxford, the Executive Committee of the Association created a Committee on Conciliation between Nations to study

\* The writer of this comment presided at the sessions of the International Law Association in Budapest, Sept. 7-8, 1934, which were devoted to a consideration of the Briand-Kellogg Pact.—ED.

<sup>1</sup> International Law Association, Report of the 37th Conference, 1932, p. 175.

<sup>2</sup> *Id.*, p. 185.

"the effect of the Briand-Kellogg Pact of Paris on International Law," of which Mr. Wyndham A. Bewes was convener. When the report of this special committee was debated at Budapest, the temper of the Association was very different from that which had inspired the 1932 report. Without exception the speakers voiced a desire to see action which would indicate that lawyers are not lagging behind politicians in the attempt to build new foundations for the world's peace. In consequence, the following resolutions were adopted by a unanimous vote of the several hundred lawyers who were present, to be known as the "Budapest Articles of Interpretation":

WHEREAS the Pact is a multilateral law-making treaty whereby each of the high contracting parties makes binding agreements with each other and all of the other high contracting parties, and

WHEREAS by their participation in the Pact sixty-three States have abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and have also renounced any recourse to armed force for the solution of international disputes or conflicts:

1. A signatory State cannot, by denunciation or non-observance of the Pact, release itself from its obligations thereunder.

2. A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.

3. A signatory State which aids a violating State thereby itself violates the Pact.

4. In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of international law, do all or any of the following things:

- (a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;
- (b) Decline to observe towards the State violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent;
- (c) Supply the State attacked with financial or material assistance, including munitions of war;
- (d) Assist with armed forces the State attacked.

5. The signatory States are not entitled to recognize as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact.

6. A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals.

7. The Pact does not affect such humanitarian obligations as are contained in general treaties, such as The Hague Conventions of 1899 and 1907, the Geneva Conventions of 1864, 1906, and 1929, and the International Convention relating to the Treatment of Prisoners of War, 1929.

Additional resolutions on the Briand-Kellogg Pact of Paris were adopted as follows:

1. That a violation of the Pact, being a matter which concerns the interests of all the signatory States, should entitle them to insist that their interests be safeguarded in the subsequent treaty of peace.

2. That the signatories of the Pact should forthwith refuse and prohibit aid to any State commencing or threatening to commence recourse to armed force, and which refuses or fails, on the demand of any signatory State, to submit the matter in dispute to the Permanent Court of International Justice or to some other agreed Tribunal for final determination.

This action of the International Law Association indicates that there is a growing conviction among lawyers throughout the world that nineteenth century ideas cannot longer be allowed to dominate our legal thinking. Progress in international organization, in the development of international justice, and in the forging of new international legislation cannot be ignored by the legal profession, whatever estimate is placed on the value of recent changes. Some reasons may exist for saying that law must always be at the rear in the march of events; but if it is too far behind the vanguard, it ceases to serve the needs which have called it into being.

MANLEY O. HUDSON

#### THE LETICIA DISPUTE BETWEEN COLOMBIA AND PERU

On May 24, 1934, one year after the Geneva agreement, representatives of Colombia and Peru signed at Rio de Janeiro a Protocol of Peace, Friendship and Coöperation and an Additional Act, which brought about a settlement of the dispute over the so-called "Leticia trapezium" fronting on the Amazon River. It will be recalled that on the night of September 1, 1932, a party of Peruvian inhabitants and soldiers from the Peruvian province across the river attacked and took the town of Leticia in Colombian territory, imprisoned the Colombian authorities and police officers, and took over the administration of the town and district. Subsequently the Peruvian Government defended and justified the aspirations which prompted this action.<sup>1</sup> The only article of the Protocol relating directly to this incident is Article 1, reading as follows:

Article 1. Perú sincerely deplores, as she has previously declared, the events which have taken place since September 1, 1932, which have disturbed her relations with Colombia. The two Republics having resolved to reestablish their relations, Perú expresses the wish that these may be restored with the same intimate friendship as in the past, and the profound cordiality of two sister peoples. Colombia shares these sentiments and declares that it has an identical purpose.

In consequence, Perú and Colombia agree simultaneously to accredit their respective Legations in Bogotá and in Lima.

<sup>1</sup> See editorial this JOURNAL, Vol. 27 (1933), p. 317.

The bone of contention in this dispute was the Boundary Treaty of March 24, 1922, which transferred to Colombia the Leticia district, inhabited mostly by Peruvians, and gave Colombia access to the Amazon River. Moved by the aspirations of the Peruvian population,<sup>2</sup> Peru desired to obtain a modification of the treaty. The Protocol under discussion, however, in Article 2 provides:

Article 2. The Boundary Treaty of March 24, 1922, ratified on January 23, 1928, constitutes one of the juridical ties which bind Colombia and Peru and may not be modified or affected except by mutual consent of the parties or by a decision of international justice within the terms below established in Article 7.

By Article 7 of the Protocol, the two countries obligate themselves "not to make war nor directly nor indirectly to employ force as a method for the settlement of their present problems or of any others which may arise in the future." In the event that diplomatic negotiations fail, they agree that either party may appeal to the procedure established by Article 36 of the Statute of the Permanent Court of International Justice, regardless of the reservations which they made on signing the Optional Clause. Should the parties not come to an agreement as to carrying out a decision of the court, they confer upon the court the powers necessary to carry out the decision.

Thus by an expression of regret on the part of Peru, a declaration that the Treaty of 1922 remains in force, and an agreement to arbitrate without reservation questions unsettled by diplomatic negotiations and to allow the Permanent Court to carry out its decision, the parties have happily settled the Leticia dispute in particular. This, however, is only a part of the general settlement. The remaining 23 articles of the Protocol and the Additional Act provide in detail for a régime of coöperation in the adjoining fluvial districts of the two countries in respect of customs, navigation, trade, and welfare of the inhabitants. Two mixed commissions are to be established to further these purposes.

This satisfactory termination of a controversy which at one time broke out in hostilities and threatened war between two neighboring republics, is a result of the first intervention of the League of Nations in the settlement of American problems. It may be interesting, therefore, to describe briefly the procedure followed by the League in accomplishing this result.

It will be recalled<sup>3</sup> that under Article 15, paragraph 4, of the Covenant, a Committee of Three, appointed by the Council, brought in a report on the dispute, which was debated and approved by the Council; and subsequently an Advisory Committee was appointed by the Council to assist in handling details. After full discussion and negotiation with the representatives of the disputants, a plan was agreed upon, which was signed by their

<sup>2</sup> The population of Leticia is preponderately Peruvian (due to its recent acquisition from Peru), Brazilians being next in number, and Colombians standing third.

<sup>3</sup> See editorial this JOURNAL, Vol. 27 (1933), p. 525.

representatives and by the President of the Council on May 25, 1933. Pursuant to this plan, a commission was sent to Leticia to take over and administer the district for one year, at the expense of Colombia, pending direct negotiations between the parties. The commission, consisting of an American, a Brazilian and a Spanish member, organized June 19, 1933, and took over the Leticia district four days later from the Peruvian forces, which immediately evacuated. At the same time Colombian forces evacuated the Peruvian posts taken by them. The commission was supported by a force of 50 Colombian soldiers, later increased to 75, which were for the time being under League control. The commission raised its own flag, which it flew in company with the Colombian flag. The Peruvian Government protested against the use of the Colombian flag, but the commission defended on the ground that the Council had found the Leticia district to be Colombian territory, and that the parties had agreed that it be administered on behalf of Colombia. The commission took over the direct and independent administration of the district and divided its work into maintenance of order and security, care of public works and public health, and examination and payment of claims in respect of property lost by inhabitants on account of the attack of September 1st. One commissioner was put in charge of each of these branches of administration.

Questions had been raised as to when the commission's term of office expired and the possibility of an extension, to whom the territory should be handed over at that time, and the augmentation of Colombia's forces in Leticia after the commission's departure. As the negotiations at Rio de Janeiro were concluded before the end of the commission's term, these questions became moot. The commission handed over the Leticia trapezium to Colombian civil authorities on June 19, 1934. The ceremony consisted of an exchange of speeches between General Moreno of Colombia, Governor of the Amazonian territory, to whom Leticia was turned over, and Commissioner Giraldez of Spain, in the name of the League. This was followed by the signing of the formal Act of Conveyance. Shortly prior to this event, the two governments had reestablished diplomatic relations by the appointment of ambassadors, pursuant to the Protocol of May 24th.

Meanwhile, the parties, after considering Geneva and Panama, finally agreed to carry on their negotiations at Rio de Janeiro under the auspices of the Brazilian Government. The negotiations were finally opened there on October 26, 1933, and continued until May 24, 1934. During this period there was a recess of about two months, as it was necessary for the Peruvian Government to supply fresh powers to its delegation since the original powers were considered inadequate, and to iron out certain differences of opinion within the delegation itself.

In the beginning a great deal of time was spent in useless discussion of the agenda and the conditions precedent to negotiation. There were also differences of opinion as to the methods of procedure. The Peruvian dele-

gation proposed to discuss first the interpretation and application of the 1922 treaty, and then to take up agreements to establish coöperation in the Amazonas region, and agreements to maintain perpetual peace and harmony; whereas the Colombian delegation proposed the following order: the recognition of the recommendations of the Council's report of March 18, 1933, as the basis of negotiations, the restoration of friendly and cordial relations on the initiative of Peru and on the explicit recognition of the validity of the 1922 treaty, the application of Articles 8 and 9 of the treaty to the Amazonas region, the consideration of practical agreements to insure coöperation and good neighborliness in that region, the consideration of agreements to insure peace, including demilitarization of the frontier and a pact of non-aggression. Colombia maintained that the 1922 treaty and the Leticia territory could not be regarded as in dispute.

As no agreement was reached, it was decided to dispense with an agenda and carry on informal conversations between the two delegations. The legal objections presented by Peru to the Salomon-Lozano Treaty were not only that it was concluded by a dictatorship unsupported by public opinion, which had not been consulted at home or in the territory ceded, but that the treaty was based upon an exchange of the Leticia trapezium for the Sucumbios triangle, which latter was not turned over to Peru.<sup>4</sup> Colombia refused to discuss these legal questions at the conference because the Council had laid down that the treaty was in effect and that the discussion of all problems was "on the basis of the treaties in force." Colombia was willing to discuss the outstanding problems and examine the legitimate interests of Peru which did not affect the validity of the treaty. All of the legal objections of Peru, she said, were aimed at invalidating the treaty and therefore could not be discussed. To discuss them would be to recognize that an act of violence would be a most effective means of bringing public treaties into legal controversy when none existed.

The Peruvians also asserted that Colombia's presence on the Amazon constitutes a danger to the economic and commercial future of Loreto and Iquitos in particular. Because of the difference in tariffs, trade will favor Leticia, particularly if Leticia is made a free port. Leticia will then become a center of smuggling. Besides, Colombia's severe regulations on navigation in Amazon waters under her jurisdiction hinders the development of Loreto trade and makes a perpetual cause of friction. The Colombians replied that this view was exaggerated; that Leticia, with under 200 inhabitants, could not set up a ruinous competition with Loreto; that it was not clear why Colombia's presence at Leticia should make smuggling easier, and that all navigation complaints had been promptly attended to. Nevertheless, Colombia was prepared to eliminate these difficulties by a series of agreements on customs union, freedom of navigation, and the like.

<sup>4</sup> Ecuador claimed rights in this triangle, and obviously Colombia could do no more than cede her own rights to Peru.

Peru further claimed that there were political objections to the treaty. Public opinion at Loreto had always regarded the treaty as dismembering its territory, which has given rise to a constant feeling of agitation and friction in the Amazon district. Besides, it places Colombia in a favorable strategic position to endanger the navigation of the Amazon by Peruvian shipping and to strangle the trade of Loreto. This situation creates a constant atmosphere of suspicion and hostility. In answer, Colombia did not regard these as sufficient reasons for modifying the treaty. The same things might be said of any boundary treaty. Any steps to separate this territory from Colombia would create a political problem of greater proportion in Colombia, where national feeling had already been wounded by the violence of September 1st. Colombia regarded the insecurity of Peruvian navigation on the Amazon as non-existent and unfounded. If there is feeling of resentment on the Amazon, the same feeling would make itself felt on the Putomayo. Colombia believed that a series of agreements of coöperation and good understanding would remove this tension and dispose of these political objections.

Colombia therefore regarded the modification of the frontier on these three grounds as unacceptable because the objections raised could be overcome by other means. The proposed exchange of territory on the River Putomayo would be open to the same objections. Besides, the territory on the Putomayo is of practically no value, while Colombia attaches great importance to its position as a riparian state on the Amazon.

Peru also suggested the possibility of special arbitration, should no agreement be reached in this conference. Colombia flatly rejected this proposal because the rise of feeling, if the conference broke down, would probably make an arbitration treaty impossible of approval and might lead to a conflict, and because no legal questions were involved since the conference proceeded on the basis of the existing treaties in force, including the Salomon-Lozano Treaty. Besides, arbitration as to the treaty because of the events of September 1st would give the advantage to the aggressor in upsetting treaties. Finally, either country through adherence to the Optional Clause, may bring any such legal claim before the Permanent Court without any further agreements.

Thus these discussions went on at Rio at least up to the middle of April, 1934. Meanwhile, Dr. Mello Franco had proposed a series of economic, commercial and cultural measures for a closer neighborly bond between the two countries. Apparently a discussion of these practical measures led away from differences as to objectives and principles and made possible the coöperative arrangement which was eventually signed. A tribute is due to Dr. Mello Franco, who patiently presided over the negotiations and brought them to a successful close. The Protocol and Additional Act ended a dispute which for nearly two years had been disturbing the long-standing friendship of Colombia and Peru, ending it upon the basis of the sanctity of treaties, a

régime of frontier coöperation, and the renouncement of war in the settlement of present problems and future differences, substituting the Hague Court for the arbitrament of the sword.

L. H. WOOLSEY

#### THE UNITED STATES-PANAMA CLAIMS ARBITRATION

Mr. Hunt's Report as Agent of the United States-Panama Claims Commission under the treaty of 1926,<sup>1</sup> will take its place with the reports of Kane, Hale, Ashton, Boutwell, Fuller and Nielsen, American representatives on earlier claims commissions, as a useful contribution to international law. While the Panama Commission is not as important, in the light of the claims examined, as are some of the earlier commissions, Mr. Hunt's report, prepared with the aid of his competent Assistant Agent, Mr. E. Russell Lutz, and his Counsel, Mr. Benedict M. English, embodies certain features which deserve special commendation.

In an introduction to the report, Mr. Hunt sets out for the benefit of future negotiators, certain suggestions for the improvement of arbitration deduced from his experience with the Panama and other commissions, *e.g.*, a necessity for great clarity in the jurisdictional clauses, notably as to the time period for the origin of claims and for their submission to the commission; for the preparation of tentative rules of procedure before the commission formally meets; for limiting, by time and conditions, the submission of new evidence; for limiting the time within which pleadings must be filed in order to give the other side a fair opportunity for counterpleading, and to give the commission the longest opportunity possible under the treaty period to deliberate upon and decide the claims submitted; suggestions as to the time to be allowed after final hearing for the commission's decision and a preference for a flexible period based upon the number of claims to be decided rather than a rigid time limit, a restriction which compelled the Panama Commission to decide all its claims within a period of four months; clearer provisions for the filling of vacancies on the commission; better provisions for distinguishing the pleading and proving of facts from the briefing of cases on the facts and the law; better methods of overcoming the difficulties arising out of the use of two languages; and other suggestions for the improvement of arbitration by special commission.

Each of the 26 cases submitted by Panama and the United States is then reported by Mr. Hunt with considerable completeness. In addition to the full decision of the commission, he includes a headnote syllabus of the opinion and a statement of the facts in the case, supplemented by an extended abstract, with quotations, from the briefs of both parties and ending with

<sup>1</sup> Department of State, Arbitration Series, No. 6, American and Panamanian Claims Arbitration, under the Conventions of July 28, 1926, and Dec. 17, 1932, Report of Bert L. Hunt, Agent for the United States. (Washington, Government Printing Office, 1934, pp. 872.)

Mr. Hunt's comments upon the decision in the light of the pleadings. As Mr. Hunt is reporting to the United States Government on the result of the arbitration, he is privileged to express dissatisfaction with the commission's opinions.

Mr. Hunt's method of presenting his report has the advantage of enabling the reader better to understand the decision and to supply its deficiencies, for the very necessity of deciding so many cases in so short a period has made most of the decisions exceedingly brief and for that reason often unsatisfactory; so that without a presentation of the arguments of both agents it might be difficult to estimate the validity, value, or scientific effect of the decisions. It seems unfortunate that the commission was so hurried in its deliberations, for it is possible that with adequate time it might have made more helpful contributions to international law. It is probably true that our best opportunity for source material comes from the impartial decisions of tribunals, a method which formed the matrix of the common law.

A third feature of Mr. Hunt's report which will be of special interest is an extended index of all the cases and most of the authorities cited by either agent, arranged under the legal rubric, rule or principle to which they were cited. This should be very helpful to students of international law.

The awards to the United States were nineteen in number amounting to about \$115,000, the awards to Panama four in number amounting to \$3,150. Several claims were dismissed. The American claims appear to have been presented with uniform thoroughness. The cost to the United States, in addition to salaries of the participating departmental officials, was about \$54,000, a sum which cannot be justly measured against the awards made, for important cases were disallowed on both sides and numerous cases were disposed of by the American Agent before presentation on the ground that submission was unwarranted because of insufficiency of facts or deficiencies in law. It is commendable that the American Agent was willing to assume this responsibility, for it seems questionable whether a commission having only a short life should be burdened with the labor of examining unsubstantial cases which the claimant government is actually unwilling unreservedly to support, and of assuming the exclusive responsibility of dismissing these cases. Nor is such proceeding fair to the defendant government. The opportunity of disposing in one judicial proceeding of numerous claims which for years defied diplomatic settlement and of cleaning the slate of long-standing differences is an advantage not calculable in pecuniary terms and altogether disproportionate to the amounts involved in a particular arbitration. The efficiency of the American Agency was facilitated by the fact that its staff was drawn in part from the personnel of the Department of State, under the practice adopted by the present Legal Adviser of having the Department prosecute or defend American arbitration cases wherever possible. The practice has the advantage of enlisting the experience of claims attorneys in the conduct of an arbitration, of bringing about

closer coördination between the government's policies or legal positions and its occasional excursions into litigious advocacy, and also of minimizing costs. Its disadvantage possibly lies in the fact that agents may become too closely identified with their views as advocates, and may take these positions back into the Department to shape their quasi-judicial views as legal advisers. But the necessity of close coöperation between the Department of State and its agents before claims commissions cannot be over-emphasized, for the agent speaks for the United States, and his unfortunate or mistaken positions, practices or policies may redound to the disadvantage of the United States as a government. It is still a regrettable fact that arbitrators are often chosen for political reasons without regard to their special technical qualifications in international law; yet their decisions are supposed to be accepted by the profession as source material.

While the present commission is not so vulnerable in this respect as some, their opportunities as contributors to international law were handicapped by the fact that the treaty under which they sat dispensed with the local remedy rule, predicated state liability upon "losses or damages originating from acts of officials or others acting for either government, and resulting in injustice," and authorized them to decide according to the "principles of international law, justice and equity." The leeway thus afforded seems to have influenced several decisions which, while possibly sustainable as fireside equity, including a stretch of the treaty word "officials," can hardly be deemed warranted by international law. For example, several awards in which the injury was inflicted on an individual by the alleged negligence of some inferior employee,<sup>2</sup> and awards for acts of pillage by sailors on shore leave<sup>3</sup> seem hardly supportable in international law. The failure of the police to protect an alien, after adequate opportunity, from the consequences of mob violence,<sup>4</sup> especially participation by the police in assaults upon aliens,<sup>5</sup> are traditional grounds for redress. It is reasonable to conclude that when the protective machinery of the state not only fails to function through negligence but actually coöperates in assaults upon foreigners, "the minor official" rule is superseded by the "state participation in the

<sup>2</sup> Manzo (p. 679, permitting a small boy to clean machinery); it is doubtful whether Mr. Hunt's distinction between the privilege of submitting and favorably deciding such claims is altogether well founded. Añorbes (p. 751; a similar case).

The Colunje decision (p. 733) is more sustainable, because the enticement of the claimant into American jurisdiction from Panama by a Canal Zone policeman, was followed by the assumption of jurisdiction by an American court, on a charge which was later nolleed by the District Attorney.

<sup>3</sup> Ruiz (p. 635); Diaz (p. 639); although in these cases the commission predicated liability on "international law".

<sup>4</sup> Banks (p. 117); Denham (p. 201); Richeson (p. 247), really Langdon; Baldwin (p. 311). In the Noyes case (p. 155), the claim was disallowed on the ground that it is insufficient to assert that *more* police protection might have averted the injury at the hands of private individuals, a mob. Under the facts, this may be sustainable.

<sup>5</sup> Langdon (p. 247), Adams (p. 275).

wrong" rule, although it should certainly be possible for the state to reduce the damages, if not to release itself from liability, by expressing its positive disapproval through adequate punishment of the minor officers. Such punishment, though deemed insufficient, did reduce the damage in the Adams case.<sup>6</sup> The difficulties of distinguishing a personal from an official act are not inconsiderable.

The failure to punish a criminal adequately was made a basis of liability in the Denham case,<sup>7</sup> where the murderer's sentence of eighteen years was first commuted by one-third and then reduced further by a general amnesty, so that only three years were actually served; the award was limited to \$5,000, a sum which Mr. Hunt deemed insufficient. Too close adherence to the "condonation" theory often overlooks the special facts of a case. International law, like private law, seems entitled to its own metaphysics; in some cases the failure to prosecute or punish may be deemed an approval or ratification of the wrong. But why cannot allowance be made for differences in fact? We recognize degrees of negligence, and juries constantly grade the amount of their verdicts on that principle. Why cannot there be degrees of negligence in governmental punishment, especially when, as must be admitted, the award is exclusively punitive. To speak of compensation to the next of kin for failure to punish a private criminal is something of a strain on the imagination; rigorous insistence on the view that *any* degree of negligence for failure to punish to the full is equivalent to condoning the original crime will strengthen the demand of certain countries to abolish the rule altogether.

In one case<sup>8</sup> an award was made for a wrongful arrest and conviction deemed without sufficient cause, based on the fact that local hostile sentiment dictated the conviction. But to draw from this the conclusion of Mr. Hunt that it would be an advantage to subject to international review the decisions of municipal courts is open to question. The difference between a grossly unfair and biased judicial proceeding resulting in a "palpable injustice", and an error of the court resulting in injustice, is not always easy to draw. The only basis for sustaining the Solomon award is to assume that a considerable degree of bad faith or outrage entered into the judgment of conviction. Whether that was true in fact is hard to say. But short of that, the decisions of municipal courts passing on the facts and on *municipal* law cannot in principle be challenged internationally. Any other rule would impair international relations. Manifest and intentional failure to accord an alien his rights under local law is an established basis of international responsibility;<sup>9</sup> but a review of local judicial proceedings to dis-

<sup>6</sup> Dismissal from the service and short punishment deemed insufficient to release state from all liability.

<sup>7</sup> P. 201; see also Baldwin (p. 311), failure to prosecute.

<sup>8</sup> Solomon (p. 457).

<sup>9</sup> Perry (p. 33). In the Denham case (p. 491), no violation of local law or bad faith was found.

cover an "improper" application of the local law is always a delicate proceeding.

Another interesting decision of the commission related to a deprivation of private property<sup>10</sup> by governmental negligence in permitting outsiders successfully to file claims to the ownership or use of property already lawfully registered in the claimant's name; yet it is not altogether common to challenge internationally the adequacy of a statutory procedure for contesting improper claims, in order to afford an alien the protection to which he is deemed entitled. But in the De Sabla case this was done. Somewhat similar claims to property were disallowed in the Browne<sup>11</sup> and Chase<sup>12</sup> cases. The largest American claim, of the Mariposa Development Company,<sup>13</sup> based on the alleged cancellation of land titles, was disallowed for lack of jurisdiction on the ground that the injury, if any, occurred after the ratification of the claims treaty. Other minor cases have no special interest for international law.

The most important case before the commission from the point of view of international law and the most questionable of all its decisions was that of the Panamanian *Compañía de Navegación Nacional* against the United States.<sup>14</sup> The case arose out of a collision on the high seas between the claimant's vessel, *David*, and a vessel belonging to the General Petroleum Company. Cross libels had been filed in different courts, the *Compañía* winning its case in the Panama courts by default and the Petroleum Company's suit in the Canal Zone District Court remaining still undecided. While it was pending and over two years after the collision, a United States sheriff arrested the *David* while passing through Canal Zone territorial waters in innocent passage, and a bond had to be filed as a condition of release; after some further judicial proceedings, the General Petroleum Co. settled the case by paying some \$16,000, thus disposing of both suits. The *Compañía* contended that the wrongful seizure of the *David* compelled it to settle the case for less than the amount of the judgment obtained by it in the Panamanian courts, and that the United States was hence liable for that loss and incidental consequences.

The commission in denying the claim held that:

The general rule of the extension of sovereignty over the 3-mile zone is clearly established. Exceptions to the completeness of this sovereignty should be supported by clear authority. There is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters.

There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the commission cannot say that

<sup>10</sup> De Sabla (p. 379).

<sup>11</sup> P. 523.

<sup>12</sup> P. 341. (Estopped because of settlement effected through mediation of American Minister in Panama).

<sup>13</sup> P. 533.

<sup>14</sup> P. 765.

a country may not, under the rules of international law, assert the right to arrest on civil process merchant vessels passing through its territorial waters.

While it is very doubtful whether the claimant could properly assert that the settlement it effected was proximately caused by the alleged illegal arrest, the commission's view of international law on the subject seems even more questionable. The fact that no country's officials had apparently ever done what the United States sheriff purported to do in this case—arrest a ship in innocent passage through territorial waters on a civil suit arising out of an earlier and extraterritorial cause of action—is alone a strong ground to challenge the commission's view. The statement that the sovereignty of the riparian state extends to the three-mile limit, or even the suggestion that general jurisdiction so extends, would not solve the issue. The question here is whether the arrest of a passing ship, not for an offense it has then committed, but as a means of obtaining forcible jurisdiction in a pending litigation between the owner and a private plaintiff, is a proper or an improper impairment of the right of innocent passage. Innocent passage historically is not an "exception" to sovereignty nor is the burden on the passing ship to prove such an "exception." The privilege of innocent passage, it is believed, has as solid a legal standing as territorial "sovereignty." The legal relations involved cannot be resolved by abstract formulae, but by a historical interpretation of the privileges attached to innocent passage and of the need of the riparian state to assert control. Both approaches warrant the conclusion that the interruption of a voyage by arrest for such a purpose as was involved in the *Compañía* case is an unjustified assertion of power. The Hague Codification Conference, both in Basis of Discussion No. 24 and in Article 9 of its draft on territorial waters annexed to the Final Act, as well as the Harvard Research in its Article 16,<sup>15</sup> all concurred in the view that the passing ship is free from arrest in such cases. Professor Gidel seems to share the view of the conference,<sup>16</sup> although it is true that the replies of the governments are not satisfactory, because so many of them are vague and ambiguous. Professor François, reporter of the Hague codification commission on territorial waters, in his recent work<sup>17</sup> approves the conclusion of the Codification Conference by expressing the opinion:

The coastal State may not arrest a vessel passing through the territorial sea for the purpose of exercising civil jurisdiction. No measures for the purpose of any civil proceedings may be taken against the vessel, save only in respect of obligations incurred for the purpose of the voyage or in respect of a liability arisen during the voyage in the territorial sea or in the inland waters, for instance as the result of a collision.

<sup>15</sup> These articles are quoted conveniently in Mr. Jessup's comment in this JOURNAL, Vol. 27 (1933), pp. 748-749.

<sup>16</sup> Article in *Revue Critique de Droit International*, XXIX, p. 16, at 38-46.

<sup>17</sup> *Handboek van het Volkenrecht, Eerste Deel*, 1931, p. 303.

That seems much the sounder view; in the interests of the freedom of the seas, and in the interests of states whose citizens are engaged in shipping and navigation, of which the United States is one, it may be hoped that the decision of the commission will not be regarded as a precedent worthy of emulation or application in the future.

EDWIN M. BORCHARD

#### THE GENERALIZATION OF THE MONROE DOCTRINE

In its note of September 10, 1931, to the Secretary-General of the League of Nations accepting League membership, the Mexican Government stated "that she has never recognized the regional understanding mentioned in Article 21 of the Covenant of the League." This dissent from the Monroe Doctrine was not considered a reservation,<sup>1</sup> but as an expression of the Mexican point of view it found vigorous reiteration in President Carranza's message to the Mexican Congress on the subject of League membership wherein he stated: "Mexico had not recognized this doctrine, since it established without the choice of all the peoples of America a criterium and a situation in which they have not been consulted."<sup>2</sup> In even stronger terms the Mexican attitude was expressed in a note addressed by the Mexican Minister for Foreign Affairs to several governments while Article 21 of the Covenant was under discussion at the Paris Peace Conference. The position of the Mexican Government at that time was that it had "not recognized and will not recognize the Monroe Doctrine or any other doctrine that attacks the sovereignty and independence of Mexico."<sup>3</sup> These frank expressions of official Mexican opinion lend added interest to the memorandum on the Monroe Doctrine presented by Dr. J. M. Puig Casauranc, Mexican Minister for Foreign Affairs, to United States Ambassador Daniels in October, 1933. This memorandum was first made public in one of an interesting series of volumes published by the Mexican Ministry for Foreign Affairs this year.<sup>4</sup>

This memorandum was prepared after consultation with the Ministers of Ecuador and Peru, accredited to the Mexican Government. From the text of the memorandum, it appears that its preparation was inspired by the belief that the new policies of the present Roosevelt administration encouraged the belief that the time was ripe to bring about a new basis of solidarity among the American republics and to remove from their relations with one another what has been a constant source of misunderstanding and suspicion.

The memorandum reviews briefly the circumstances under which President

<sup>1</sup> See Hudson, "Mexico's Admission to Membership in the League of Nations," this JOURNAL, Vol. 26 (1932), pp. 114, 116.

<sup>2</sup> Philip Marshall Brown, "Mexico and the Monroe Doctrine," *ibid.*, p. 117.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Séptima Conferencia Internacional Americana, Memoria General y Actuación de la Delegación de México, presentada por el Dr. J. M. Puig Casauranc, Jefe de ella y Secretario de Relaciones Exteriores.* (México: Imprenta de la Secretaría de Relaciones Exteriores, 1934), p. 261 ff.

Monroe's message was pronounced. It concludes that at the time of its original pronouncement the doctrine was "clear and perfectly delimited" but that more recently its meaning and purposes have become misunderstood and of uncertain extent and application. The memorandum expresses the belief that:

If, then, it is possible to doubt the advisability and propriety of bringing the Monroe Doctrine "up to date," making it accord with the broad spirit of Americanism that originally inspired it, and elevating this doctrine to the position of an *American principle* of international law, at least no one will venture to dispute the urgent necessity for disauthorizing once and for all the erroneous interpretations which have deprived the doctrine of its true character and have made of it an exceedingly efficacious factor in the creation of mistrust and misgivings, to such an extent that—paradoxical as this may seem—it is today the most serious of obstacles to the spiritual unity of the Continent. . . .<sup>5</sup>

Confirming its belief in the present uncertainty and unsatisfactory effects of recent interpretations of the doctrine, the Mexican Government cites a passage from Clarence H. Haring's *South America Looks at the United States*.<sup>6</sup> The memorandum then contains a reference to the Argentine Republic's "reservation" with reference to its membership in the League and to the statement of Mexico in like connection.

The memorandum poses the questions whether the Monroe Doctrine should be frankly abolished, whether such a step would be acceptable to the Government and public opinion of the United States, and whether such an extreme solution is necessary. These three questions are answered in the negative. The Mexican Government then suggests a middle course, which it describes as follows:

(That means may perhaps be the investment of the Monroe Doctrine with a character that is American in the full sense of the term, through a pact consecrating it as a principle adopted by each and every American nation, and creating the consequent obligation to unite in its defense while sharing the same rights and obligations.) . . .

The Monroe Doctrine, elevated to the rank of an American pact of solidary defense, would enter upon the second stage of its natural development: it would be perfected and would acquire the maximum prestige and the integral force proper to it in view of its continental significance. It would be brought up to date. Otherwise, it will fail to move with the times, turning its back upon the progress of the Spanish-American nations and open to criticism—in our opinion—as an anachronism because of its stagnation. Even if it is given its legitimate interpretation, even if it is disinterestedly and magnanimously applied, it will continue to be a lowering force for these nations, inasmuch as it offers them—graciously—a species of paternal protection no longer suitable for them to receive, since they emerged some time ago from the position as minors which was theirs at the beginning of their independent existence. . . .<sup>7</sup>

<sup>5</sup> *Memoria*, op. cit., p. 263.

<sup>6</sup> Pp. 102-104.

<sup>7</sup> *Memoria*, op. cit., p. 267.

The Mexican Government was encouraged to hope that some such policy would be acceptable to the United States in view of the various declarations of President Roosevelt announcing the policy of the "good neighbor." The Mexican Government then ventures to suggest the formula to serve as a basis for discussion, stressing the fact that the initiative in any such development should come from the United States. The formula is as follows:

✓ The nations of the Americas, united in defending the sovereignty and integrity of each one of them respectively, adopt as their own the principle of continental independence proclaimed by James Monroe, President of the United States, in his message to Congress of December 2, 1823, and raise it to the rank of an American Doctrine, including therein the rights and obligations with which the maintenance of that doctrine invests each of the said nations.

At the same time, they proclaim the inviolability of the principle of national autonomy, subordinating this principle only to the obligatory arbitration established by themselves for the settlement of their disputes; and they absolutely prohibit any interference among them other than that arising from pacts freely entered into by the nations or from judgments of arbitral tribunals, or else resulting from offers of mediation, of good offices or of some other procedure recognized by international law, offers which may, as in all analogous cases, be freely accepted or rejected by the countries to which they are extended.<sup>8</sup>

It was suggested that some such proposal might well be brought before the then pending Seventh International Conference of American States, which was about to assemble in Montevideo.

The reaction of the Government of the United States to this proposal may be judged from the fact that no proposition looking toward the generalization of the Monroe Doctrine was advanced at the Montevideo Conference. It will be recalled that at that conference a Convention on Rights and Duties of States, which dealt with intervention and some cognate matters, was not accepted by the United States but in regard to it a reservation was made by Secretary Hull in which he referred to recent declarations of President Roosevelt and expressed confidence that these declarations would suffice to convince our sister republics to the south that the United States had definitely foresworn intervention in the affairs of the other American republics.<sup>9</sup>

This attitude of the Government of the United States should cause no surprise. In spite of the extraordinary ignorance and disagreement in the United States regarding the actual meaning and purport of the Monroe Doctrine, that doctrine remains a sacred symbol to the American people and anything which looks like an attempt to tamper with it is greeted with immediate and vigorous suspicion. This attitude has been frequently evidenced, as in the well-known reservation of the United States to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Dis-

<sup>8</sup> *Memoria, op. cit.*, p. 269.

<sup>9</sup> See James Brown Scott, "The Seventh International Conference of American States," this JOURNAL, Vol. 28 (1934), pp. 219, 223 ff.; also Supplement, *ibid.*, p. 75, and the Final Act of the Conference, p. 187.

putes and similar reservations to arbitration treaties. It appeared very clearly in the discussions centering around the Covenant of the League of Nations where the popular clamor in regard to the Monroe Doctrine convinced President Wilson that something must be said about it in the Covenant of the League; Article 21 was the result.

It may be that the curious phraseology of Article 21, which seems to describe the Monroe Doctrine as a "regional understanding," may have encouraged the belief in some quarters that the United States was tending away from its traditional attitude that the Monroe Doctrine was first and last a unilateral declaration of policy by the United States, although that traditional point of view has frequently been reiterated by statesmen of this country since the Covenant of the League was drafted. The Mexican Government's proposal for the general "Americanization" of the Monroe Doctrine is not the first step in this direction.

(At the Fourth Pan American Conference, in 1910, the Brazilian Government, through a desire to honor the memory of Senhor Nabuco, who as Brazilian Ambassador to the United States had played a large part in the development of the Latin American policy inaugurated by Secretary Root, wished to have the conference adopt a resolution recognizing the Monroe Doctrine as "a permanent factor making for international peace upon the American continent.") This project was discussed with the Chilean and Argentine representatives and various changes in phraseology were suggested. Members of the other delegations were sounded out and some dissatisfaction was revealed. Señor Alejandro Alvarez, who participated in the discussions as a member of the Chilean delegation, states that "The delegation of the United States, consulted in regard to it, made it clear that it would be very acceptable for Latin America to make the Monroe Doctrine hers; but that if in doing this she was going to create dissensions in the midst of the assembly, it was preferable to make no presentation at all." <sup>10</sup>

In view of the improbability of securing unanimous assent to its resolution, the Brazilian delegation did not push its project. Not having available the exact language of the United States delegation, it is impossible to tell just what was meant by a willingness to have Latin America "make the Monroe Doctrine hers." When the subject was again brought forward on the initiative of the Uruguayan Government at the Fifth Pan American Conference, in Chile in 1923, "the firm opposition of the United States actually stifled this project, to the great disappointment and discomfiture of many of the other American nations." <sup>11</sup>

The chief difficulty with these proposals for generalizing the Monroe Doctrine, as the Mexican Government clearly understood, lies in the field of the doctrine's corollaries and varying interpretations rather than in the

<sup>10</sup> Alvarez, *The Monroe Doctrine*, p. 193, at p. 195.

<sup>11</sup> Brown, *loc. cit.*, p. 118. Compare Report of the Delegates of the United States of America to the Fifth International Conference of American States (1924), p. 6.

original scope of the policy. There would be little basis for objection to a joint declaration by the United States and the other American republics regarding the preservation of the American continents from European aggression. There would probably be no objection in the United States to a joint declaration of policy against interference in European political affairs. Such a declaration could be phrased in such a way as to keep within the spirit of the Covenant and therefore League members could avoid conflicts with their obligations under that instrument. The Leticia and Chaco affairs have shown that the League can interest itself in American disputes without opposition from the United States. On the other hand, it is extremely doubtful whether public opinion in the United States would agree to any declaration regarding the Monroe Doctrine which could be interpreted as a limitation upon the right of self-defense upon which the Monroe Doctrine rests. The abrogation of the Platt Amendment suggests a willingness on the part of the present Administration to rest upon its general rights under international law rather than upon special treaty rights even in the Caribbean area where we have been most jealous of our special interests.

It should be quite possible to phrase a joint declaration which would strengthen rather than weaken the basic policy of the Monroe Doctrine. The discussions attending the final conclusion of the Briand-Kellogg Pact show that a reservation of self-defense is greeted with suspicion. The danger is that such a reservation on behalf of the United States might counteract in the rest of the Americas the advantages of the proposed joint declaration. The problem is not insoluble. It ought to be recognized in the United States that our Latin American policy is a matter of primary importance and as fundamental in United States foreign policy as any part of the Monroe Doctrine itself. The negotiations would require great tact and skill in draftsmanship. The recent trend of United States policy in Latin America, both in the latter part of the Hoover Administration and under the present Roosevelt Administration, offers the most favorable basis for such a step which has ever existed. Even if immediate difficulties should prove insuperable, the continuing consideration of such a new policy should make its fruition increasingly more feasible.

PHILIP C. JESSUP

#### AFGHANISTAN, ECUADOR AND THE SOVIET UNION IN THE LEAGUE OF NATIONS

The membership of the League of Nations has been increasing progressively since 1920. When the First Assembly met on November 15, 1920, the League had 42 members. Six States—Albania, Austria, Bulgaria, Costa Rica, Finland and Luxemburg—were admitted to membership in 1920; three—Estonia, Latvia and Lithuania—in 1921; Hungary in 1922; Abyssinia and the Irish Free State in 1923; the Dominican Republic in 1924; Germany in 1926; Mexico in 1931; and Iraq and Turkey in 1932. The procession was joined, in September, 1934, by Afghanistan, Ecuador and the

Union of Soviet Socialist Republics, and as on previous occasions<sup>1</sup> the event seems to call for some analysis of the process by which the result in each case was effected.

### (1) AFGHANISTAN

Afghanistan was not one of the States originally invited to accede to the Covenant in 1920. Its frontiers with British India were agreed upon in 1919. Since the signature on November 22, 1921, of a treaty by which Great Britain and Afghanistan each recognized the complete internal and external independence of the other,<sup>2</sup> Afghanistan has unquestionably been master of its own international policy, and numerous treaties have been made with other States.<sup>3</sup> Since 1923, the government is that of a constitutional monarchy.<sup>4</sup>

On September 24, 1934, the Minister of Afghanistan in London sent the following telegram to the Secretary-General of the League of Nations:<sup>5</sup>

According my Government telegraphic instructions I submit you following:

In accordance with the terms of Article I of the Covenant of the League of Nations, I have the honour to request that the Afghan Government may be admitted as a Member of the League of Nations, and that this request may be placed on the agenda of the present meeting of the Assembly of the League.

The Government of Afghanistan is prepared to accept the conditions laid down in Article I of the Covenant and to carry out all obligations involved in membership of the League.

On the following day, the Fifteenth Assembly decided to place the question of the entry of Afghanistan into the League of Nations on its agenda, and to refer it to the Sixth Committee. On September 26, the Sixth Committee approved a report of a subcommittee and unanimously recommended the admission. The subcommittee found:<sup>6</sup> (1) that the application was in order; (2) on the point of recognition, that a "majority of European and

<sup>1</sup> See the writer's studies: "Membership in the League of Nations," this JOURNAL, Vol. 18 (1924), p. 436; "Mexico's Admission to the League of Nations," *id.*, Vol. 26 (1932), p. 114; "Admission of Turkey to the League of Nations," *id.*, Vol. 26 (1932), p. 813; "Admission of Iraq to the League of Nations," *id.*, Vol. 27 (1933), p. 133; "The Argentine Republic and the League of Nations," *id.*, Vol. 28 (1934), p. 125.

<sup>2</sup> British Treaty Series No. 19 (1921), Cmd. 1786; 14 League of Nations Treaty Series, p. 47.

<sup>3</sup> Treaties have recently been made by Afghanistan with the following States: Persia, June 22, 1921, 33 L. N. Treaty Series, p. 285; France, April 28, 1922, 105 *id.*, p. 147; Germany, March 3, 1926, 62 *id.*, p. 115; Poland, Nov. 3, 1927, 74 *id.*, p. 83; Latvia, Feb. 16 1928, 78 *id.*, p. 99; Switzerland, Feb. 17, 1928, 73 *id.*, p. 323; Belgium, June 16, 1928, 97 *id.*, p. 97; Finland, July 17, 1928, 112 *id.*, p. 9; Japan, Nov. 19, 1930, 121 *id.*, p. 237.

<sup>4</sup> For a history of constitutional development in Afghanistan and the text of the Constitutional Law of Nov. 11, 1931, see 5 Dareste, *Les Constitutions Modernes* (4th ed. by Delpech and Laferrère, 1933), pp. 499, 501.

<sup>5</sup> League of Nations Document, A.46.1934.VII

<sup>6</sup> *Id.*, A.54.1934.VII.

Asiatic countries have diplomatic representatives at Kabul"; (3) that Afghanistan's Government was "regularly established," and its frontiers "regularly delimited," the area being 760,000 square kilometers and the population "some 10 millions"; (4) that it was "an independent sovereign State"; and (5) that Afghanistan had stated its willingness to fulfil its obligations, and that in view of its participation in the Disarmament Conference there was no occasion to raise the issue of armaments before the League's Advisory Committee on Military, Naval and Air Questions. On September 27, 1934, the Assembly voted unanimously (47 votes being cast) for the admission; representatives of Afghanistan thereupon assumed seats in the Assembly.<sup>7</sup> On September 27, 1934, the contribution of Afghanistan to the expenses of the League of Nations for 1935 was fixed, "in view of the material impossibility of referring the question . . . to the Allocation Committee for a detailed study" and "without prejudice to any decision that may be reached next year," at one unit.<sup>8</sup>

In this case, the normal procedure established in 1920<sup>9</sup> was followed, and no difficult legal questions arise. Afghanistan's assumption of the obligations of the Covenant was informal, but it was in accordance with the precedents.

## (2) ECUADOR

The Republic of Ecuador became a signatory to the Treaty of Versailles of June 28, 1919, but to date it has not deposited a ratification at Paris. On September 27, 1934, the following telegram, signed by the President and the Minister for Foreign Affairs of Ecuador, was sent to the Secretary-General of the League of Nations:<sup>10</sup>

By the authority of the Senate of the Republic I have the honour to inform you and through you the League of Nations that Ecuador has decided to become a Member of that distinguished Institution which is generously and continually working for peace among the peoples. I take this opportunity of extending a greeting on behalf of the Government and people of Ecuador to the great friendly nations which are so worthily represented in the Assembly. His Excellency M. Gonzalo Zaldumbide, Envoy Extraordinary and Minister Plenipotentiary will represent Ecuador in the League and I hope that the latter will believe what he will say in the name of the Republic especially when he expresses the earnest desire of the people of Ecuador for peace freedom and justice.

The Fifteenth Assembly having adjourned, this telegram was placed before the Council on September 28, 1934, and the Secretary-General stated:

<sup>7</sup> Verbatim Record of the Fifteenth Assembly, Sept. 27, 1934, p. 3.

<sup>8</sup> League of Nations Document, A.60.1934.X.

<sup>9</sup> Records of First Assembly, Committees, II, p. 159.

<sup>10</sup> League of Nations Document, C.444.M.191.1934; Minutes of the Council, Sept. 28, 1934, p. 5.

"Ecuador, an original Member of the League of Nations, was now acceding to the Covenant. There was therefore no question of an admission or election." Hence, the Secretary-General expressed his confidence "that the Council would be willing to consider Ecuador forthwith as a member of the League, with all the rights and duties arising out of this capacity." After satisfaction with this course had been expressed by members of the Council, the President of the Council invited the representative of Ecuador to the Council table and extended to him a personal welcome.<sup>11</sup>

This seems to have been a very informal method of admission. Article 1 of the Covenant provides that the signatories named in the annex to the Covenant shall be original members of the League of Nations; while it does not expressly set as a condition the ratification of any of the treaties of peace in which the Covenant is embodied, such a condition would seem to result from the concluding paragraphs of the peace treaties (*e.g.*, those following Article 440 of the Treaty of Versailles). Heretofore many people have assumed that ratification of one of the treaties of peace is a condition precedent to acceptance of membership by any of the signatories named in the annex.<sup>12</sup> Only three signatories named in the annex have not ratified one of the treaties of peace, namely, the United States of America, Ecuador and Hedjaz. The action taken with reference to Ecuador therefore sets a precedent which might in the future prove useful to the United States, and possibly to Saudi Arabia (as the successor of the Hedjaz).

### (3) UNION OF SOVIET SOCIALIST REPUBLICS

None of the Soviet Republics was named in the Annex to the Covenant, and the Union was formed only in 1922.<sup>13</sup>

On September 15, 1934, the following telegram was sent to the People's Commissariat for Foreign Affairs at Moscow by delegates representing the thirty States named:<sup>14</sup>

The undersigned, delegates to the fifteenth Assembly of the League of Nations from the States hereinafter enumerated: Abyssinia, Albania, Australia, Austria, United Kingdom, Bulgaria, Canada, Chile, China, Czechoslovakia, Estonia, France, Greece, Haiti, Hungary, India, Iraq, Italy, Latvia, Lithuania, Mexico, New Zealand, Persia, Poland, Roumania, South Africa, Spain, Turkey, Uruguay, and Yugoslavia,

<sup>11</sup> Minutes of the Council, 82d session, 5th meeting, pp. 5-7.

<sup>12</sup> See, however, the admirable paper by Clyde Eagleton, "The Problem of the Admission of the United States into the League of Nations," 10 *New York University Law Quarterly Review* (1932), p. 58; 13 *Revue de Droit International et de Législation Comparée* (1932), p. 632.

<sup>13</sup> On the constitutional evolution of the Union, see 2 Dareste, *Les Constitutions Modernes* (4th ed.), p. 381 ff.

<sup>14</sup> League of Nations Document, A.34.1934. An excellent account of events leading up to this situation is to be found in 11 *Bulletin of International News* (London, 1934), pp. 215-224.

Bearing in mind that the mission of maintaining and organising peace, which is the fundamental task of the League of Nations, demands the coöperation of all the countries of the world,

Invite the U.S.S.R. to join the League of Nations and give the League its valuable collaboration.

This telegram is being communicated to the President of the Assembly of the League of Nations.

On the same date the Governments of Denmark, Finland, Norway and Sweden "confirmed to the Soviet Government, through the ordinary channel, their decision to vote in favor of the admission of the U.S.S.R. to the League of Nations." The Swedish delegate to the Assembly notified the President of the Council of this action on September 15, 1934, adding "that the delegations in question would have been authorized to associate themselves with an invitation to that effect, had such an invitation been issued by the Assembly itself." On September 15, 1934, M. Maxim Litvinov, People's Commissar for Foreign Affairs, addressed to the President of the Assembly the following letter:<sup>15</sup>

The Soviet Government has received a telegram signed by a great many members of the League of Nations, namely, South Africa, Albania, Australia, Austria, Gt. Britain, Bulgaria, Canada, Chile, China, Spain, Estonia, Abyssinia, France, Greece, Haiti, Hungary, India, Iraq, Italy, Latvia, Lithuania, Mexico, New Zealand, Persia, Poland, Roumania, Czechoslovakia, Turkey, Uruguay and Yugoslavia, in which, pointing out both that the mission of the League of Nations is the organisation of peace, and that this necessitates the general coöperation therein of all nations, they invite the U.S.S.R. to join the League of Nations and add its coöperation. Simultaneously the Soviet Government has been officially informed by the Governments of Denmark, Finland, Norway and Sweden, of their favourable attitude to the entry of the U.S.S.R. into the League.

The Soviet Government, which has made the organisation and consolidation of peace the main task of its foreign policy, and has never been deaf to proposals for international coöperation in the interests of peace, considering that, coming as it does from an overwhelming majority of members of the League, this invitation represents the real will to peace of the League of Nations, and their recognition of the necessity of coöperation with the U.S.S.R., is willing to respond to it, and become a member of the League, occupying therein the place due to itself, and undertaking to observe all the international obligations and decisions binding upon members in conformity with Article 1 of the Covenant.

The Soviet Government is especially glad to be coming into the League at a moment when the question of the amendment of the Covenant in order to bring it into harmony with the Briand-Kellogg Pact, and to banish completely international warfare, is being considered by it.

Since Articles 12 and 13 of the Covenant leave it open to States to submit disputes to arbitration or judicial settlement, the Soviet Gov-

<sup>15</sup> League of Nations Document, A.34.1934.

ernment considers it necessary to make it clear that, in its opinion, such methods should not be applicable to conflicts regarding questions arising before its entry into the League.

I venture to express the hope that this declaration will be accepted by all members of the League in that spirit of sincere desire for international coöperation and for ensuring peace to all nations, in which it is made.

On September 15, 1934, the Council adopted the following resolution:<sup>16</sup>

The Council,

Having had communicated to it the letter of September 15th, 1934, which has been addressed by the Union of Socialist Soviet Republics to the President of the Assembly with regard to that State's entering the League of Nations,

Decides, in virtue of the powers which it derives from Article 4 of the Covenant, to appoint the Union of Socialist Soviet Republics to be a permanent Member of the Council as soon as its admission into the League of Nations has been agreed to by the Assembly,

Invites the Assembly to approve this decision.

This resolution was communicated to the President of the Assembly, and on September 17, 1934, the Assembly decided to place the question of the entry of the U.S.S.R. into the League of Nations on its agenda and to refer this question to the Sixth Committee. When the matter was discussed in the Sixth Committee on September 17, no disposition was shown to regard M. Litvinov's letter as containing any reservation. The admission was opposed by representatives of Portugal, Switzerland and the Netherlands, and representatives of Belgium and the Argentine Republic stated that they would abstain from voting. The following resolution was adopted by the Sixth Committee,<sup>17</sup> with 38 votes in favor of the admission,<sup>18</sup> three votes against it and seven abstentions:

The Sixth Committee,

In consideration of the invitation addressed by thirty delegations to the Government of the Union of Soviet Socialist Republics on September 15th, 1934, with a view to the entry of the Union of Soviet Socialist Republics into the League, and of the communication on the same subject from the Governments of Denmark, Finland, Norway and Sweden;

In consideration of the communication addressed to the President of the Assembly by the Government of the Union of Soviet Socialist Republics on the same day, in reply to those referred to above;

And in consideration of the fact that the Soviet Government states in its reply that it undertakes "to observe all the international obligations and decisions binding upon Members in conformity with Article 1 of the Covenant":

Recommends the Assembly to admit the Union of Soviet Socialist Republics to the League of Nations.

<sup>16</sup> League of Nations Document, A.35.1934.

<sup>17</sup> League of Nations Document, A.36.1934.VII.

<sup>18</sup> On Sept. 18 the representative of Finland stated to the Sixth Committee that if he had been present on the previous day he would have voted for the admission of the Soviet Union.

On September 18 the President of the Assembly placed before it the following proposal of the General Committee:<sup>19</sup>

(a) The report of the Sixth Committee would be, without further delay, submitted to the Assembly, and, if the Assembly agrees, under the conditions provided for under the Rules, to deal immediately with the matter, a vote would be taken at once on the admission of the Union of Soviet Socialist Republics into the League of Nations;

(b) That vote having been taken, and provided it agreed with the Sixth Committee's recommendation, the Assembly would decide, without further procedure, to deal with the Council resolution of September 15th concerning the granting of a permanent seat on the Council to the Union of Soviet Socialist Republics;

(c) If the Assembly so decided, it would immediately proceed to the vote necessitated by the resolution of the Council, under Article 4, paragraph 2, of the Covenant.

After some debate a vote was taken. Thirty-nine delegates voted in favor of the admission, and three delegates voted against it; the delegates of the Argentine Republic, Belgium, Cuba, Luxemburg, Nicaragua, Peru and Venezuela abstained,<sup>20</sup> but the abstentions were not taken into account for calculating the majority; the necessary two-thirds majority would have existed even if they had been counted. The President then declared that the admission of the Soviet Union had been decided by the necessary majority. On the same day the Assembly voted to approve the decision of the Council "appointing" the Union of Soviet Socialist Republics to be permanently represented on the Council; on this proposition fifty ballots were cast, of which forty were favorable and ten were abstentions; the delegates of the Argentine Republic, Belgium, Cuba, Luxemburg, Nicaragua, Netherlands, Peru, Portugal, Switzerland and Venezuela abstained from voting. On September 18 also the Soviet delegation, responding to an invitation of the President, took its place in the Assembly.

On September 27, 1934, the contribution of the Union of Soviet Socialist Republics to the expenses of the League of Nations for 1935 was fixed "in view of the material impossibility of referring the question . . . to the Allocation Committee for a detailed study" and "without prejudice to any decision that may be reached next year," at 79 units.<sup>21</sup>

In this case, an irregular procedure was followed for the admission of a new member to the League of Nations. No subcommittee was created, and the usual questions do not seem to have been investigated. The procedure is interesting because of the invitation extended by the various delegations. It is to be noted that the invitation was extended not by the Assembly, but by thirty States represented in the Assembly; this was because it was not possible to foresee a unanimous vote in the Assembly. In some quarters in

<sup>19</sup> Verbatim Record of the Fifteenth Ordinary Assembly, 9th meeting, p. 1.

<sup>20</sup> *Id.*, p. 4.

<sup>21</sup> League of Nations Document, A.60.1934.X.

Geneva unanimity was thought to be necessary for an invitation by the Assembly. Article 1, paragraph 2, of the Covenant provides:

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Under this text it would seem competent for the Assembly by two-thirds vote to deal with all stages of the problem of admission of a new member, and since only two-thirds of the Assembly need agree to admission in its final stage it ought to be possible for two-thirds of the Assembly to approve an invitation to be sent by the Assembly. This view was opposed in certain quarters on the ground that any departure from the established process of admission required a unanimous vote. The thirty States whose delegates sent the invitation of September 15, 1934, together with the four States which on the same day announced their intention to support the admission, were not quite two-thirds of the members represented in the Fifteenth Assembly.<sup>22</sup> As it could not be known in advance how many States' delegates would abstain from voting, a departure from the procedure previously followed<sup>23</sup> was necessary.

MANLEY O. HUDSON

<sup>22</sup> Fifty-two members of the League of Nations were represented in the Fifteenth Assembly at the time.

<sup>23</sup> Mexico and Turkey had previously been invited by the Assembly to become members, and on both occasions the invitation had been voted unanimously. See Records of Twelfth Assembly, Plenary, p. 37; Records of Special Assembly, League of Nations Official Journal, Special Supplement No. 102, p. 21.

## CURRENT NOTES

### THE ANNUAL MEETING OF THE SOCIETY

The next annual meeting of the American Society of International Law, the 29th in consecutive succession, will be held in Washington, D. C., April 25-27 next. The general subject selected for the meeting is Neutrality—with special reference to proposals for revisions of the law and policy in that matter.

The meeting will open on Thursday evening, April 25th, at 8:15 p.m., with the President's address, which will deal generally with the subject of the sessions. Sessions will be held at 9:30 on Friday and Saturday mornings, April 26th and 27th, on Friday afternoon at 2:15, and Friday evening at 8:15, April 26th. Topics to be specially dealt with are the munitions traffic in relation to neutrality, belligerents and the freedom of the seas, and the Kellogg Pact and neutrality.

The meeting will close with the customary banquet on Saturday evening, April 27th, at the Willard Hotel, at which all the sessions will also be held.

A detailed program giving the final titles of the papers, the speakers, and other information will be furnished to the members of the Society as soon as practicable. Reserve these dates now for your trip to Washington next April to take part in these important and timely discussions.

GEORGE A. FINCH

*Chairman, Committee on Annual Meeting*

### THE SUPPLEMENT

The JOURNAL is again in a position to supply its readers with unusually valuable supplements during the year 1935. On two previous occasions, namely, in 1929 and 1932, there were issued as supplements the draft conventions and comments of the Research in International Law carried on under the auspices of the faculty of the Harvard Law School with the assistance of an advisory committee composed of the leading international lawyers and professors of that subject in the United States. The Advisory Committee of the Research in International Law will adopt in final form in February next draft conventions and comments on three additional subjects, namely, Extradition, Jurisdiction to Punish for Crime, and the Law of Treaties. These three documents will thereafter be issued as regular supplements to the JOURNAL, one being issued with the April number, another with the July number, and the third with the October number. This material will make a volume estimated at about 750 pages. It will come to our readers separately paged but with continuous pagination and a separate index so that the three documents will be available for binding at the end of the year as a single volume of the supplement.

The work on the subject of Extradition has been done under the direction of Dean Charles K. Burdick of the Cornell Law School, that on the subject of Jurisdiction to Punish for Crime, by Professor Edwin D. Dickinson of the School of Jurisprudence of the University of California, and that on the Law of Treaties, by Professor James W. Garner, Head of the Department of Political Science of the University of Illinois. Each reporter has been assisted by expert advisers from the Bar, the teaching profession, or the Government service.

The draft conventions themselves will occupy but a few pages of these supplements. The remainder will be comments upon the conventions as a whole and upon the individual articles, containing a history or outline of the general subjects and specific topics, quotations of opinions of authorities, citations to cases, and instances of practical application by governments. Complete references and annotations are given in all cases, and it is believed that these supplements not only speak the last word upon the subjects of which they respectively treat, but deal with the law as it has existed from the earliest times.

In order that the supplements for 1935 might constitute a single volume devoted to these three subjects, without any extraneous material, no supplement accompanies the January JOURNAL because, as above indicated, these draft conventions and comments will not be ready for publication until after their approval next month. The supplement which will accompany the April JOURNAL will consequently be a double supplement and cover not only the April, but also the January number. Supplements will accompany the July and October numbers to complete the publication of these projects.

The JOURNAL is furthermore happy to be able to send this extraordinarily valuable and additional material as a part of the regular service to its readers without extra charge.

THE MANAGING EDITOR

#### A POINT OF PUNCTUATION

The Webster-Ashburton Treaty of August 9, 1842, was considered and construed by the Supreme Court of the United States in the case of Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd. (291 U. S. 138, decided January 15, 1934).<sup>\*</sup> The opinion was written by Mr. Chief Justice Hughes. Particularly in question was the final clause of Article 2 of the treaty which is thus quoted in the opinion (p. 148):

It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

<sup>\*</sup> Reprinted herein, *infra*, p. 150.—ED.

Two citations are given for the quoted treaty text, namely 8 Stat. 574, and Malloy, *Treaties*, Vol. 1, pp. 652, 653. Those two cited prints of the quoted text are identical therewith both in their wording and in their punctuation.<sup>1</sup>

In the briefs of counsel in the instant case the text of the Webster-Ashburton Treaty is cited from Volume 8 of the Statutes at Large and the final clause of Article 2 of the treaty is quoted (four times in the brief for the appellant and once in that for the appellee); all those quotations begin with "That" (omitting "It being understood"); three of the four quotations first mentioned omit the comma after "Lake of the Woods"; and the last mentioned omits the first "the."

One question presented by counsel was whether the words of the treaty "as now actually used" are to be deemed to "refer back to and limit all that precedes" or, on the other hand, to apply "only to Grand Portage" (see 291 U. S. at pp. 141, 145). The Supreme Court did not definitely adopt either of the conflicting views (*ibid.*, 157-158). Reference, however, was made to the opposing opinions of other courts as to the application of the words "as now actually used." The Circuit Court of Appeals for the 8th Circuit had in an earlier case (1931) concluded that those qualifying words referred only to Grand Portage (*Clark v. Pigeon River Improvement Slide and Boom Company*, 52 F. 2d, 550, at pp. 555-556), and that decision was followed by the same court (1933) in the instant case (63 F. 2d, 567). In the Supreme Court of Canada, in a case decided in 1932, two judges agreed in this respect with the view previously expressed by the Circuit Court of Appeals while two judges (perhaps three) disagreed therewith (*Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*, 1932 Canada Law Reports, Supreme Court, 495, 497, 500-501, 507-508; and see 291 U. S. at pp. 152-156). The Supreme Court of the United States thought that there was "force in the reasoning of the opinion" of the judges last mentioned "that these words were not limited to that portage" (p. 157).

In the archives of the Department of State there are two original documents of the text of the Webster-Ashburton Treaty; one of these is the signed original of that treaty wherein the final sentence of Article 2 is thus written:

It being understood that all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods; and also Grand Portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

It will be convenient to call the foregoing text from the signed original the *O* text and the previously quoted text from the Statutes at Large the *S* text.

<sup>1</sup> One of them differs slightly in capitalization; but variances of capitalization are not herein discussed or even noted. Curiously enough, however, in this very case, in the brief of counsel for the appellant, the suggestion is made that the words "the cascades" in the Act of March 3, 1901, 31 Statutes at Large, 1455, refer to "a number of such falls" of Pigeon River and not merely to the one called "The Cascades."

Comparing *O* with *S* it will be seen that the wording is identical, but in punctuation (aside from a hyphen) there are two differences; *O* has a comma after "communications" which *S* lacks, and, of more significance, *O* has a semi-colon after "Lake of the Woods" where *S* has a comma.

Now assuming the punctuation of the treaty to be relevant <sup>2</sup> to the construction of its wording, it is submitted that the semi-colon instead of the comma after "Lake of the Woods" gives weight to the argument that the words "as now actually used" are applicable only to Grand Portage.

Perhaps one would hardly expect to see a semi-colon where it appears in the signed original <sup>3</sup> of the treaty; but it is there very clearly written, and it is also very clearly written in the other original document of the text which is in the archives of the Department of State. That document is the instrument of ratification of the Webster-Ashburton Treaty on the part of Great Britain; that ratification, according to the usual practice, is under the Great Seal and signed by the chief of state, in this case, Queen Victoria. In the treaty text written in that instrument of ratification the punctuation of the clause here under consideration is precisely the same as in the signed original of the treaty; and the wording is the same except that for "citizens and subjects" we find "Subjects and Citizens," a difference in order which accords with the principle of the alternat, the "citizens" being American citizens and the "subjects" being British subjects.

It is to be remembered that bilateral treaties are ordinarily <sup>4</sup> bipartite, that is to say, they are signed in two parts or originals, one for each government. The Webster-Ashburton Treaty was thus signed in duplicate originals. The text of the treaty which is included in the British instrument of ratification was necessarily copied from the text of that one of the two originals which was for the British Government; for the ratifications of the Webster-Ashburton Treaty were exchanged at London on October 13, 1842, and the instrument of ratification on the part of Great Britain is dated October 5, 1842. Accord-

<sup>2</sup> The following is from the opinion in the case of *Ewing v. Burnet*, 11 Peters, 41, at p. 54:

"Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it."

<sup>3</sup> It is the rule of the treaty edition now under preparation by the Department of State (entitled *Treaties and Other International Acts of the United States of America*) that the source text of a bilateral treaty is the signed original (or one of the signed originals) thereof which is in the archives of the Department of State; and that rule is strictly followed except in cases where it is either necessary or because of highly unusual circumstances desirable to depart from it. Of that edition, Volumes 1 (short print), 2, and 3 have been published. The text of the Webster-Ashburton Treaty will appear in Volume 4 as Document 99, at page 363 *et seq.* That volume has reached the stage of plate proof. The text therein printed is, of course, the *O* text.

<sup>4</sup> There are early instances of multipartite bilateral treaties; the Treaty of Ghent, for example, was signed in six original examples, three of which are now in the archives of the Department of State.

ingly, it seems to follow that the two signed originals of the Webster-Ashburton Treaty were in this respect identical, as they should have been, both in wording (except for the alternat) and in punctuation.

In the earlier as well as in the later of the two opinions of the Circuit Court of Appeals above cited the relevant portion of the treaty is quoted; and the wording naturally appears with punctuation as in the *S* text, for the citation is from 8 Statutes at Large. In each of the three opinions written in the case cited from the Supreme Court of Canada<sup>5</sup> the treaty text is quoted and the three quotations are identical. No citation is given, but as the wording is "subjects and citizens" and not "citizens and subjects" one must infer a Canadian or British source. In punctuation the text as quoted by the Supreme Court of Canada has the comma and not the semi-colon after "Lake of the Woods" as in *S*; but it also has the comma after "communications" and the hyphen before it as in *O*. It appears reasonable to assume from this that the text quoted in the opinions written in the Supreme Court of Canada was taken from the volume entitled *Treaties and Agreements Affecting Canada in force between His Majesty and the United States of America*, officially printed at Ottawa in 1927; there the relevant passage is at page 20, with wording and punctuation as in the opinions in 1932 Canada Law Reports, Supreme Court; it is stated in that Canadian treaty compilation of 1927 (p. 18) that the text of the Webster-Ashburton Treaty there printed is from *British and Foreign State Papers*, XXX, 360; and one finds precisely the same wording and punctuation in that volume of the *State Papers* (published in 1858).

Various other prints of the Webster-Ashburton Treaty have been examined. In only one of them does the semi-colon after "Lake of the Woods" appear; that is in Senate Document No. 1, 27th Congress, 3d Session, serial 413 (printed by Thomas Allen), where, with the annual message of President Tyler to Congress of December 7, 1842, are printed the presidential message<sup>6</sup> of August 11, 1842, submitting to the Senate the Webster-Ashburton Treaty and the accompanying papers; the concluding portion of Article 2 of the treaty, with the semi-colon after "Lake of the Woods," is at page 29 of that Senate document. However, the same papers were printed (by Gales and Seaton) at the same time by order of the House of Representatives in House Executive Document No. 2, 27th Congress, 3d Session, serial 418; the pagination is different; and in that House document at page 27 one finds the comma and not the semi-colon after "Lake of the Woods."

The semi-colon has a history which antedates the original documents hereinafter mentioned.

<sup>5</sup> As printed in the official report cited.

<sup>6</sup> The original Senate print of this message and accompanying papers is not now available; it may be, however, that the Senate document of Dec. 7, 1842, is from the same type as that print, with changes of page numbers; a Senate resolution of Aug. 30, 1842, removed the injunction of secrecy "as soon as" the treaty "shall have been proclaimed"; the date of the proclamation is Nov. 10, 1842.

When the agreement negotiated by Daniel Webster and Lord Ashburton at Washington was complete, it was first reduced to writing in two instruments, a treaty and a convention, which were signed and sealed by the two plenipotentiaries on August 9, 1842; one of these, the treaty, in eight articles, included Articles 1 to 7 of the Webster-Ashburton Treaty as we now know it; the other, the convention, of five articles, included (with a difference not here material) Articles 8 to 11 of the Webster-Ashburton Treaty as we now know it. On the following morning, August 10, 1842, President Tyler suggested, to quote the words of Lord Ashburton, "that it was desirable that these separate instruments should be thrown into one." This was immediately done and the consolidated treaty, the Webster-Ashburton Treaty, was drawn up, signed and sealed on August 10, 1842, though bearing the same date as the earlier instruments, namely, August 9.

The two earlier original instruments (treaty and convention) of August 9, 1842, are not now in the archives of the Department of State; indeed, there is there to be found no mention of them and no record of the change from two acts to one; but the despatches of Lord Ashburton, facsimiles of which are in the Library of Congress, tell of them. Lord Ashburton's originals (*i.e.*, the originals for the British Government) of the two earlier instruments were sent to London on the day of their signature by courier and Lord Ashburton had then (before the days of the telegraph) no way of getting them back. The present writer is not informed whether those two original instruments still exist; but Lord Ashburton sent copies of them (besides the originals) with two of his despatches of August 9, 1842, the treaty with despatch No. 17 and the convention with despatch No. 18; and in the copy of the treaty as first signed (in eight articles) we find (from a facsimile in the Library of Congress; *F. O. America*, 5:380) at the end of Article 2 the same text and the same punctuation, including the semi-colon, as in the British instrument of ratification now in the archives of the Department of State.

One may go somewhat farther back without finding among the papers now available in Washington any earlier trace of the semi-colon.

The wording of Article 2, in all essentials similar to the final text, appears to have been first written as a paragraph of the note of Webster to Ashburton of July 27, 1842. For that note there are four sources here, none of them the original; the first of these in importance would perhaps be the record copy in *D. S.*, 6 Notes to the British Legation, 239-246; but the passage now in question (at p. 244) was badly jumbled by the scrivener who, so to speak, halted and went back to pick up his trail.<sup>7</sup> In the House document cited above

<sup>7</sup> The record copy reads thus:

"It being understood that all the water communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries."

from serial 418 the erroneous record copy is followed (at p. 53); but strange to say the print of Webster's note in the Senate document of 1842 (also cited above from serial 413) has (at p. 60) the correct wording of both the *O* and the *S* texts though not the punctuation of either.<sup>8</sup>

Finally there is the copy of Webster's note of July 27, 1842, which Ashburton sent to London as enclosure No. 1 to his despatch No. 15 of the following day (facsimile in the Library of Congress, F. O. America, 5:380). In this copy we find a wording and punctuation of the relevant passage<sup>9</sup> not exactly the same as any other source previously mentioned, but having a comma, not a semi-colon, after "Lake of the Woods." Probably there was some necessary haste in getting the news off to Lord Aberdeen and consequently hurried work, for there is this postscript in Ashburton's hand to his despatch of July 28, 1842: "Mr Webster's note about the Boundary came to me too late to read it through but I dare say it is right. I saw the rough draft this morning."

Perhaps one may argue that the original semi-colon was a scrivener's inadvertence, faithfully copied and maintained; but one may believe, on the other hand, that the original semi-colon was deliberately made part of the signed agreement and was perpetuated accordingly.

In any case the moral of this story, if it have a moral, depends upon a point of punctuation.

HUNTER MILLER

#### INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION

In April, 1934, the Governing Board of the Pan American Union requested the American Arbitration Association, Inc., and the Council on Inter-American Relations, Inc., to create, jointly, an agency for the establishment of an inter-American system of commercial arbitration under the terms of Resolution XLI of the Seventh International Conference of American States, which provides:

That with a view to establishing even closer relations among the commercial associations of the Americas, entirely independent of official control, an Inter-American Commercial Agency be appointed in order to represent the commercial interests of all Republics, and to assume, as one of its most important functions, the responsibility of establishing an Inter-American system of arbitration.

In accordance with the request of the Governing Board of the Pan American Union, the Inter-American Commercial Arbitration Commission was organ-

<sup>8</sup> Collated with the *S* text, it corresponds in the comma after "Lake of the Woods"; but it adds a comma after "communications" and one after "portages"; and it omits the comma after "Grand Portage."

<sup>9</sup> It reads as follows:

"All the water communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, to be free and open to the use of the subjects and citizens of both countries."

ized and held its first meeting on September 26, 1934, at its headquarters, the Latin-American Center, 67 Broad Street, New York.

The Chairman of the Commission is Spruille Braden, one of the delegates of the United States to the Seventh International Conference of American States. When completed, the commission will have approximately 60 members, representing all of the American Republics.

Commercial arbitration and its possible development has been the subject of discussion at practically all of the Conferences of American States and Pan American Commercial Conferences. Furthermore, a study of the laws of arbitration in the American Republics was made by the Inter-American High Commission in 1928, and the practice of arbitration was examined by the Pan American Union, in coöperation with the American Arbitration Association, in 1931. This study, presented to the delegates of the Seventh International Conference of American States, constituted the basis for the resolution authorizing the establishment of a system of commercial arbitration.

The underlying thought in the development of such a system is the standardization of the laws governing arbitration procedure, and the development of more uniform practices. Such standards were approved in Resolution XLI of the Seventh International Conference of American States, as follows:

The following approximations of standards in matters of procedure or of practice are deemed essential in rules and regulations used by trade and commercial organizations to the successful functioning of an American system:

- a) Agreements to arbitrate, whether relating to existing or future controversies, to be valid and enforceable, and where enforcement is not provided for by law, trade discipline is to be provided.
- b) Parties to have the power to designate arbitrators and to fill such vacancies or to provide a method therefor.
- c) Proceedings by *de facto* arbitrators to be more precisely defined by the parties or organization under whose auspices the arbitration is to be held.
- d) The full impartiality of the arbitrator to be provided for, with the right of challenge or removal, by the organization under whose auspices the arbitration is being conducted in a manner provided for in the rules or regulations governing the proceedings.
- e) An uneven number of arbitrators to be provided for under the rules, all of whom are to participate in the proceedings from the beginning.
- f) Awards in all instances to be unanimous or by majority vote.
- g) Waiver of the right of appeal to be provided for in the rules, which shall be binding on the parties, and which will limit the ground for appeal to procedural matters and to such questions of law as both parties agree to submit to the court.
- h) The wider use of discipline by the organization whose members participate in an arbitration and refuse to abide by the award where the law is inadequate to compel performance of the terms of the award.

The Inter-American Commercial Arbitration Commission has adopted as the most expeditious plan for the development of a system of inter-American arbitration, the establishment of a local committee in each American Republic, representing in so far as possible, nationals of the different American Republics resident in that republic. These committees, familiar with the laws and trade practices in the republic wherein they reside, will bring about the organization of arbitration tribunals, either independently or in coöperation with an appropriate existing commercial organization, such as a national chamber of commerce. Panels of arbitrators including, as far as possible, nationals of all of the American Republics resident in that republic, will be appointed, and standard rules for the conduct of arbitration in such tribunals are now in preparation.

A standard clause for use in inter-American commercial contracts has been prepared. While the laws of many American Republics do not, as yet, provide for the enforcement of an arbitration agreement in a contract referring to future controversies which may arise thereunder, the friendly attitude of the business men, lawyers and commercial organizations in all of the countries concerned encourages the Commission to anticipate that good faith will be sufficient in the carrying out of such agreements, in the large majority of cases. Meanwhile, the local committees of the Commission are assuming, as one of their important responsibilities, the preparation of appropriate amendments to the arbitration laws in the various republics, in order to bring them into harmony with the standards approved by the Seventh International Conference of American States.

In the short time since its organization, the Commission has not only completed the above plan, but is putting it into operation in some of the American Republics and is proceeding as rapidly as possible with its initiation in the others.

SPRUILLE BRADEN

#### THE AUSTRIAN CONSTITUTION OF 1934

The tempestuous events in Austria since March 4, 1933, have resulted in the adoption of the new Federal Constitution of April 24, 1934. Many of its provisions have a special significance because of the light which they throw upon the Austrian attitude toward international law and the conduct of foreign relations.<sup>1</sup> There having been no opportunity to observe the practical application of these constitutional principles, the interpretations which follow are necessarily based entirely upon a textual analysis of the new document.

Following the phraseology of Article 9 of the Constitution of 1920, the new

<sup>1</sup> The extraordinary circumstances surrounding the adoption of the so-called corporative constitution are well known. The text of the new constitution first appeared in the decree of April 24, 1934 (*Bundesgesetzblatt für die Republik Österreich*, No. 70, April 30, 1934); it was subsequently given its formal approval by the former National Assembly April 30, 1934 (*Bundesgesetzblatt für die Republik Österreich*, No. 72, April 30, 1934). Simultaneously the title of the official gazette was changed to: *Bundesgesetzblatt für den Bundesstaat Österreich*. The text of the constitution is reprinted in its first number of May 1, 1934.

constitution establishes as one of its fundamental principles that "The generally recognized norms of the law of nations constitute an integral part of the federal law" (Article 8). Since similar provisions were incorporated in the German Constitution of 1919 (Article 4), the Spanish Constitution of December 9, 1931 (Article 7),<sup>2</sup> and the Estonian Constitutions of 1920 (Article 4) and 1933 (Article 4),<sup>3</sup> this feature is not to be regarded as a novelty. Nevertheless, the new Austrian Constitution affords no solution to the much-debated question whether the assent of Austria to an alleged "rule" of international law is necessary for the incorporation of the rule into the body of federal law, or what, if this assent is necessary, is the appropriate manner in which it is to be demonstrated.<sup>4</sup> Beyond the mere enunciation of this principle, however, the constitution empowers the Federal Court of Justice to take jurisdiction over offenses against international law (Article 175), with a further proviso that a special federal law shall establish the particulars of this competence and shall outline the procedure. From this it may be argued (1) that Article 8 may be given more than a formal interpretation and that "international law" will be held by municipal courts to have a fairly broad content, or (2) that the reverse may be the case, that the special law to be enacted by the legislature may, in the process of definition, establish limitations which may narrow its scope. In any event, it is possible that the proposed enactment may finally determine the authority competent to express Austria's "assent" to particular rules of international law if this should be held necessary. This may eventually terminate, in Austrian law, at least, a troublesome theoretical question which has not had, thus far, great practical significance.

As in the past, the President nominally "represents the Confederation in foreign affairs, receives and accredits ambassadors, gives the necessary approval for the appointment of foreign consuls, names the consular representatives of the Confederation, and concludes international treaties" (Article 78). It will be understood, naturally, that the Federal Government, controlled by the Chancellor, will exercise these and other presidential powers in fact.

In view of the federal character of the Austrian State, the conduct of foreign affairs involves two different questions: (1) Where is the line to be drawn between the competence of the Federal authorities and those of the *Länder*? and (2) What limitations are to be imposed, and what formalities established, to govern the exercise of the power by Federal authorities?

The first of these questions is clearly disposed of in the new constitution. Jurisdiction to conclude *all* treaties is vested in the Federal Government

<sup>2</sup> See Manley O. Hudson, this JOURNAL, Vol. 26 (1932), p. 579 ff.

<sup>3</sup> The Estonian Constitution of 1933 (*Riigi Teataja*, No. 86, Oct. 28, 1933) readopted the language of the 1920 document in this respect.

<sup>4</sup> Hans Kelsen, *Die Verfassungsgesetz der Republik Österreichs (1919-1922)*; for Germany, the same question is argued by G. A. Walz, "Die Bedeutung des Art. 4 der Weimar Reichsverfassung für das nationale Rechtssystem," in *Zeitschrift für Völkerrecht*, Vol. 13 (1924), p. 165 ff.

(Article 34, para. 2), and the exercise of the treaty-making power, in any degree, by the *Länder* is clearly proscribed. But in every federal system, there remains the danger that the actions of local authorities may prejudice the municipal enforcement of international obligations properly concluded. This has been anticipated in the new constitution and several of its articles give assurance to the Federal Government that it may avoid embarrassment on this account. The Austrian equivalent of Article VI of the Constitution of the United States is found in Article 112 which establishes the primacy of the Federal constitution over the constitutions of the *Länder* by the simple prescription that the latter may not be in conflict with the former. Article 43, however, defines in greater detail the subordinate rôle of the *Länder*. This article specifies rather more precisely than is the case in other national constitutions the responsibilities of the member-states with regard to treaties. "The *Länder* are required to take precautions when, within the sphere of their autonomous action, it becomes necessary to apply international treaties. If a *Land* does not suitably comply with this duty, the authority to take such measures, including the necessary legislation, passes to the Federal authority. In the application of treaties with foreign States, the Confederation reserves the right of supervision, even over matters which pertain to the autonomous sphere of action of the *Länder*." This supervision is one of the forms of "indirect federal administration" (*mittelbare Bundesverwaltung*), the procedure of which is set forth in further detail in Article 116. The result of the constitutional scheme is twofold: (1) local authorities are under a well defined mandate to observe applicable treaty stipulations, subject to federal intervention, and (2) an absolute and enforceable injunction is laid upon the *Länder* to refrain from enacting local legislation which might, in any degree, interfere with treaty enforcement. Of course, Austria could not validly maintain in an international controversy resulting from the non-observance of a treaty that defects in her constitutional system excuse her from the performance of her international obligations. Nevertheless, the new constitution obviates the possibility of internal conflict, and despite her federal character, Austria faces the rest of the world as a single, homogeneous unit, entirely competent to give guarantees of treaty observance. Since her *Länder* have frontiers in common with six foreign Powers and international irritations are almost continuous, Austria's care to resolve debatable questions of jurisdiction before they arise has added significance.

The conduct of foreign affairs by the Federal authorities is somewhat complicated by the existence of no less than six bodies which participate, to some extent, in the legislative process. The Federal Assembly (*Bundesversammlung*) is empowered to "deliberate" upon declarations of war, with only an implication that its assent is required (Article 52). Those international treaties which "modify legislative norms or which obligate the Confederation to enact legislation" will come before the Federal Diet (*Bundestag*) in the form of projects of law emanating from the Government (Article 51, para. 3).

Such treaties, in order to be "valid," must be approved by the Diet (Article 68), but the constitution does not specify that such approval must precede ratification. Whether treaties to be valid internationally must be approved before their ratification by the Diet promises to become a highly debated question among Austrian jurists. Article 68 does openly admit of at least one exception to the requirement of legislative approval: under certain conditions, the Government is empowered to place treaties relating to the regulation of commercial relations and transportation into effect by decree for a period not to exceed one year. The constitution also recognizes the possibility that a condition may arise which may make it desirable for a treaty to supersede a portion of the constitution itself. Where an international treaty involves such a modification, a special procedure is outlined: the deliberations in the Diet require the presence of a quorum and the approval of two-thirds of the members voting upon the proposal (Article 60).

A second class of international treaties is recognized in Article 68: "International treaties of a public character, which do not modify legal relationships, to be valid must have the approval of the Council of State (*Staatsrat*) or of a committee elected from it." This introduces the third legislative element. The Council of State, twenty members of which will belong to the Federal Diet, is inferior to the Diet, and while the treaties upon which it passes are public (as distinguished from secret), they will not present complications in the legal structure within the State. In the third place, there may be treaties of a more confidential nature, for which publicity may be undesirable, but which do not involve changes in legislation (Article 79). Under these circumstances the President may authorize the Government to conclude treaties which are not comprised within the categories enumerated in Article 51, para. 3 (treaties altering, or assuming an obligation to alter, legal relationships) or Article 68 (other *public* treaties). Hence, whenever the Government finds it advisable to conclude a secret agreement with a foreign Power which will establish a perfect international obligation, this may be authorized subject to but one practical limitation: that the treaty so concluded cannot alter the law, and, by implication, that the foreign Power is aware of this disability. No great confusion is expected to follow from this. The "political" treaties which are the most likely subjects of secret agreement do not usually concern the realm of domestic legislation. This raises an interesting query: If international law is an integral part of the federal law, does Article XVIII of the Covenant of the League of Nations, requiring the registration of treaties, constitute a "generally recognized" principle of international law?

In summary, then, Austrian treaties fall into three categories: (1) those which affect the law of the land; (2) those public treaties which do not affect the local law; and (3) treaties in regard to which legislative action is rendered unnecessary.

Facilities for public knowledge, if not popular control, of foreign affairs

are established in several sections of the constitution. (1) Articles 51 and 68, above-mentioned, require legislative discussions of certain classes of treaties; (2) Article 52 requires that when the Federal Assembly deliberates upon a declaration of war that this be done in a "public session"; (3) Federal treaties upon which the Diet has passed are to be published in the *Bundesgesetzblatt* with a statement of the decision of the Diet (Article 67). Incidentally, these treaties are to be published only in their German text, when such is authentic; and, (4) the possibility of a popular referendum is indicated in Article 65 (para. a) where it is made possible for the Government to refer to the people a project of law which might otherwise go to the Diet, and, in that manner, to overrule an adverse decision in the Diet. Treaties are not, however, directly mentioned in this passage.

The latent possibilities of at least one other article merit brief mention. Article 147 is an "emergency" clause designed to enable immediate administrative action to be taken "whenever it may be necessary to maintain security and public order, to safeguard important economic interests or the financial interests of the Confederation." It is apparent that treaties might become a suitable vehicle for surmounting such emergencies. Where this emergency action is necessary, the ordinance power of the Government may be freely used to accomplish the necessary purpose. The decrees issued under this article have a duration of no more than three years and may be rejected by the Diet when submitted to that body in due course. Nevertheless, should a treaty be ratified and placed in effect by emergency decree, the legal requirements of the moment will have been satisfied and the subsequent rejection of the decree by the Diet would hardly overcome the *fait accompli*. Article 147 closely resembles the Italian law of January 31, 1926, which is one of the juridical corner-stones of the Fascist régime.<sup>5</sup> It is well known that the Austrian Constitution of April 24, 1934—generally known as the "corporative" constitution—was inspired in large measure by the Fascist example and experience. The text of Article 147 follows closely that of the Italian law of 1926 which was enacted with an eye to its possible use in connection with treaties, in which case it overrides all other constitutional limitations imposed under the *Statuto*. Should this background color the interpretation of the Austrian Constitution, it is apparent that many of its valuable constitutional safeguards—if they were intended as such—may be set aside. It is to be hoped that the necessity of such an interpretation will not arise.

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<sup>5</sup> *Gazzetta ufficiale* (Rome), 1926, No. 100; see H. Arthur Steiner, "The Treaty-Making Power in Fascist Italy," *American Political Science Review*, Vol. 25 (1931), pp. 147-149.

## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16—NOVEMBER 15, 1934

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series *Geneva*, A Monthly Review of International Affairs; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department.

#### August, 1933

- 2 to April 2, 1934 COSTA RICA—IRISH FREE STATE. Exchanged notes in regard to commercial relations. Text: *G. B. Treaty Series*, No. 28 (1934).

#### December, 1933

- 21 ARABIA—TRANSJORDAN. Exchanged ratifications of treaty of friendship and good neighborhood, signed at Jerusalem on July 27, 1933. *Cmd.* 4391.

#### February, 1934

- 3 AFGHANISTAN—GREAT BRITAIN. Notes exchanged in Kabul regarding delimitation of frontier. Text: *G. B. Treaty Series*, No. 25 (1934), *Cmd.* 4701.

#### April, 1934

- 16 GREAT BRITAIN—POLAND. Signed convention relating to tonnage measurement of merchant ships. *Poland* No. 2 (1934), *Cmd.* 4704.
- 19 GREAT BRITAIN—RUSSIA. Signed parcel post convention. Text: *Russia* No. 2 (1934), *Cmd.* 4669.
- 24 GREAT BRITAIN—LITHUANIA. Signed convention regarding legal proceedings in civil and commercial matters. *Lithuania* No. 2 (1934), *Cmd.* 4693.

#### May, 1934

- 2 BELGIUM—GREAT BRITAIN. Signed convention for reciprocal enforcement of judgments in civil and commercial matters. *Cmd.* 4618.

#### June, 1934

- 4 ECUADOR—GREAT BRITAIN. Signed supplementary convention to the treaty of Sept. 20, 1880, regarding extradition. *Ecuador* No. 1 (1934), *Cmd.* 4700.
- 11/28 LITHUANIA—UNITED STATES. Signed agreement modifying money-order convention of 1923. *T. I. B.*, Sept., 1934, p. 13.
- 23 DANZIG—POLAND. Signed agreement relating to harbor police. Text: *L. N. O. J.*, Sept., 1934, p. 1123.

#### July, 1934

- 2 DANZIG—POLAND. Signed convention on social insurance, which provided for arbitral tribunal to settle possible differences of opinion as to its interpretation. *L. N. M. S.*, Sept., 1934, p. 214.

- 5 ESTONIA—LATVIA. Exchanged ratifications of treaty for organization of alliance, signed at Riga, Feb. 17, 1934. *T. I. B.*, Aug., 1934, p. 3.
  - 20/30 GREAT BRITAIN—NETHERLANDS. Exchanged notes regarding commercial relations. *G. B. Treaty Series*, No. 23 (1934), *Cmd.* 4662.
  - 24 HAITI—UNITED STATES. Signed agreement at Port-au-Prince, modifying Articles I, II and V of the agreement signed Aug. 7, 1933, concerning "Haitianization of the Garde" and withdrawal of military forces from Haiti. *T. I. B.*, Aug., 1934, p. 3.
- August, 1934
- 2 and 17 CHILE—UNITED STATES. Agreement concerning radio communications between amateur stations on behalf of third parties, reached by exchange of notes. *T. I. B.*, Sept., 1934, p. 13.
  - 16 DOMINICAN REPUBLIC—UNITED STATES. State Department announced that Dominican Republic had negotiated a satisfactory agreement on external debt of Dominican Republic with Foreign Bondholders Protective Council. Terms: *N. Y. Times*, Aug. 17, 1934, p. 1. *Press Releases*, Aug. 18, 1934, p. 105.
  - 20 and Oct. 12 CHINA—UNITED STATES. Notes on silver-purchasing policy of the United States exchanged. Texts: *Press Releases*, Oct. 20, 1934, p. 259. *N. Y. Times*, Oct. 15, 1934, p. 4. *Times* (London), Oct. 16, 1934, p. 14.
  - 21 AFGHANISTAN—UNITED STATES. Recognition of Afghanistan by the United States Government announced. *B. I. N.*, Nov. 8, 1934, p. 17.
  - 22 BRAZIL—URUGUAY. Signed treaty of conciliation and obligatory arbitration at Rio de Janeiro. *T. I. B.*, Oct., 1934, p. 1.
  - 23 ARGENTINA—UNITED STATES. Reciprocal copyright relations established by proclamation of President Roosevelt. *Press Releases*, Aug. 25, 1934, p. 135. *Droit d'auteur*, Nov., 1934, p. 122.
  - 23 WHEAT ADVISORY COMMITTEE. Concluded its meetings in London and adjourned till Nov. 20, 1934, to meet in Budapest. *B. I. N.*, Aug. 30, 1934, p. 23.
  - 24 "RULES OF WAR" CONFERENCE. Belgium issued invitation to all nations to take part in an international conference on the rules of war in Brussels, June, 1935. Draft convention for humanization of war, drawn up at Monaco in February, 1934, endorsed by International Congress of Military Medicine, held at Liège in June, 1934. *B. I. N.*, Aug. 30, 1934, p. 13.
  - 28 AIR TRAFFIC CONGRESS. International Air Traffic Association opened congress at The Hague. *N. Y. Times*, Aug. 29, 1934, p. 11.
  - 29 ESTONIA—GREAT BRITAIN. Exchanged ratifications of agreement supplementary to treaty of commerce and navigation of Jan. 18, 1926, signed July 11, 1934. *G. B. Treaty Series*, No. 32 (1934), *Cmd.* 4736.
  - 29 SAAR PLEBISCITE, 1935. On Aug. 29, the organization of a Supreme Plebiscite Tribunal and eight divisional tribunals was announced by Secretariat of the League of Nations, to begin operations on Sept. 1. Appointments: *L. N. M. S.*, Aug., 1934, p. 188. On Sept. 5, France submitted memorandum to League Council suggesting that two plebiscites be held, one preliminary and one definitive. *C. S. Monitor*, Sept. 5, 1934, p. 3. *N. Y. Times*, Sept. 9, 1934, IV, 2 and VIII, 3; Oct. 7, 1934, IV, 1. On Sept. 8, the Council examined the report of its committee on the measures taken since June in preparation for the plebiscite to be held on Jan. 13, 1935. It was decided to hold extraordinary session about Nov. 15 to examine further reports. *L. N. M. S.*, Sept., 1934, p. 211. *L. N. O. J.*, Sept., 1934, p. 1147.

- 30 GERMANY—SWEDEN. Signed clearing agreement in Berlin. *B. I. N.*, Sept. 13, 1934, p. 16.
- 31 GERMANY—NETHERLANDS. Signed agreement providing for transfer of interest on all private German loans and other debt obligations, in Holland. *B. I. N.*, Sept. 13, 1934, p. 16.

*September, 1934*

- 1 GERMANY—SWEDEN. Revised trade agreement came into force. *Cur. Hist.*, Nov., 1934, p. 246.
- 1/17 GREAT BRITAIN—UNITED STATES. Arrangement for mutual validation of certificates of air worthiness, effected by exchange of notes. *Press Releases*, Sept. 22, 1934, p. 14. Text: *Ex. Agr. Ser.*, No. 69.
- 3 CUBA—UNITED STATES. Reciprocal commercial agreement, signed on Aug. 24 and proclaimed by President Roosevelt on Aug. 30, came into force. Text: *Ex. Agr. Ser.*, No. 67.
- 4-21 MUNITIONS INDUSTRY. Special committee of the Senate investigating the munitions industry held hearings in Washington. Analysis: *Foreign Policy Reports*, Dec. 5, 1934.
- 5 AUSTRIA—UNITED STATES. Exchanged ratifications of supplementary extradition treaty signed May 19, 1934. *U. S. Treaty Series*, No. 873.
- 6 BELGIUM—GERMANY. Agreement signed, applying also to Luxemburg, for working of clearing-house arrangements for trade between the three countries. *B. I. N.*, Sept. 13, 1934, p. 11.
- 6 IRAQ—SYRIA. Signed agreement regarding transference to Syria of 1,400 relatives and dependents of Assyrians who crossed frontier into Syria in 1933. *B. I. N.*, Sept. 13, 1934, p. 24.
- 6 JAPAN—RUSSIA. Signed agreement for navigating Russo-Manchurian border waters. *C. S. Monitor*, Sept. 6, 1934, p. 1.
- 6 SCANDINAVIAN CONFERENCE. Foreign Ministers of Sweden, Norway, Finland and Denmark met in Stockholm to discuss commercial coöperation. *B. I. N.*, Sept. 13, 1934, p. 31.
- 7-19 LEAGUE OF NATIONS COUNCIL. 81st session opened on Sept. 7, and 82d session on Sept. 19, for consideration of entry of new members into the League, the Saar plebiscite, mandates and other matters. *L. N. M. S.*, Sept., 1934. *L. N. O. J.*, Nov. 1934.
- 9 INTERNATIONAL LAW ASSOCIATION. Opened 38th conference in Budapest and adopted resolution on the Kellogg Pact to be known as "Budapest articles of interpretation of the Briand-Kellogg pact." Text: *Times* (London), Sept. 13, 1934, p. 9. *C. S. Monitor*, Oct. 1, 1934, p. 1. *World Affairs*, Dec., 1934, p. 210, this JOURNAL, *supra*, p. 93.
- 12 BALTIC PACT. Treaty for mutual understanding and agreement on foreign political questions of mutual importance, signed at Geneva by Foreign Ministers of Estonia, Latvia and Lithuania. *Times* (London), Sept. 13, 1934, p. 9. Text: *T. I. B.* Sept., 1934, p. 4. *N. Y. Times*, Nov. 11, 1934, VIII, 9. Text: *L'Esprit Internationale*, Oct. 1, 1934, p. 506.
- 15-27 LEAGUE OF NATIONS ASSEMBLY. Held 15th ordinary session, during which Afghanistan, Ecuador and Soviet Union were admitted to membership and the latter given permanent seat on Council. Spain, Chile and Turkey were elected as non-

- permanent members. Committee of 22 to formulate program for peace in Chaco was set up. Resolutions: *L. N. M. S.*, Sept., 1934.
- 17 ALBANIA—RUSSIA. Established diplomatic relations. *B. I. N.*, Sept. 27, 1934, p. 36.
- 17 GREAT BRITAIN—ITALY. Exchanged notes for reciprocal validation of certificates of airworthiness. *G. B. Treaty Series*, No. 30 (1934), *Cmd.* 4734.
- 18-28 INTERNATIONAL LABOR ORGANIZATION. Soviet Union was admitted to the International Labor Organization on Sept. 18, Afghanistan on Sept. 27, and Ecuador on Sept. 28, bringing total membership to 62 states. *I. L. O. Monthly Sum.*, Sept., 1934.
- 18 SOVIET UNION. Admitted to membership in the League of Nations at the 15th Assembly. *L. N. M. S.*, Sept., 1934, p. 201.
- 19 BULGARIA—GREECE. Dispute over execution of arbitral award of March 29, 1933, concerning certain forests in Central Rhodope, discussed by League of Nations Council. *L. N. M. S.*, Sept., 1934, p. 209. See awards in this JOURNAL, Vol. 28 (1934), pp. 760, 773.
- 20 ITALY—SWITZERLAND. Renewed arbitration treaty of Sept. 20, 1924, for ten years. *T. I. B.*, Oct., 1934, p. 1.
- 21 GERMANY—NETHERLANDS. Signed agreement for clearing system under control of Reichsbank. *B. I. N.*, Sept. 27, 1934, p. 31. Denounced by Netherlands, the agreement lapsed on Nov. 16, 1934. *Times* (London), Nov. 3, 1934, p. 11.
- 22 PERMANENT COURT OF INTERNATIONAL JUSTICE. Sir John Fischer Williams, the umpire appointed by the Permanent Court, gave his award in dispute between the Imperial Persian Government and the Ceskomorawska Kolben-Danek Company. *L. N. M. S.*, Oct., 1934, p. 253.
- 24 CUBA—DOMINICAN REPUBLIC. Formal note of refusal of Dominican Republic to accede to Cuba's request for extradition of former President Machado made public. Crimes charged to General Machado regarded as political and thus outside scope of extradition treaty in force between the two countries. *Cur. Hist.*, Nov., 1934, p. 216.
- 24-29 INTER-PARLIAMENTARY UNION. Held 30th conference at Istanbul, and adopted resolutions on security and disarmament, social questions, representative system, etc. *Interparliamentary Bulletin*, Sept.-Nov., 1934, No. 9-11. *World Affairs*, Dec. 1934, p. 212.
- 25 SWITZERLAND'S WAR DAMAGES. At request of Swiss Government, the Council of the League of Nations dealt with a difference between the Swiss Confederation and Germany, the United Kingdom, France and Italy, as regards reparation for damages suffered by Swiss nationals during the World War, amounting to about 50 million gold francs. A rapporteur was appointed to consider the question. *L. N. M. S.*, Sept., 1934, p. 208.
- 26 GERMANY—ITALY. Signed new clearing agreement for trade payments. *B. I. N.*, Oct. 11, 1934, p. 17.
- 27 AFGHANISTAN. Admitted to membership in League of Nations at the 15th Assembly. *L. N. M. S.*, Sept., 1934, p. 203.
- 27 CHINESE EASTERN RAILWAY. Announced that Japan and Russia had agreed upon price to be paid by Manchukuo for Soviet Russia's half-share in the railway.

- N. Y. Times*, Sept. 28, 1934, p. 7. *Economic Review of Soviet Union*, Nov., 1934, p. 236. *Cur. Hist.*, Nov., 1934, p. 254.
- 27 FINLAND—GREAT BRITAIN. Claim of Finland against United Kingdom in respect of Finnish boats used by the United Kingdom during the war was dealt with by Council of the League but decision postponed to next session. *L. N. M. S.*, Sept., 1934, p. 208.
- 27 INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION. Established at Latin American Center in New York by Pan American Union, to set up arbitral tribunals in North and South America. Held meeting in New York. *N. Y. Times*, Sept. 28, 1934, p. 17. *C. S. Monitor*, Nov. 15, 1934, p. 11.
- 28 to October 16 CHACO DISPUTE. Committee of 22 set up by the Assembly of the League of Nations met on Sept. 23 and appointed a conciliation subcommittee which met on Sept. 29. It was found that 28 governments had taken measures to enforce embargo on arms and war material to Bolivia and Paraguay. *L. N. M. S.*, Sept., 1934, p. 207. Norway's agreement of Oct. 5 to enforce embargo completed list of European countries taking such action. *B. I. N.*, Oct. 11, 1934, p. 25. On Oct. 15 and 16, full committee of 22 of the Assembly approved report of negotiations of subcommittee, and decided to call an extraordinary meeting of the Assembly on Nov. 20, 1934. *L. N. M. S.*, Oct., 1934, p. 242.
- 28 ECUADOR. Admitted to membership in the League of Nations at the 15th Assembly. *L. N. M. S.*, Sept., 1934, p. 203.
- 29 ARGENTINA—GERMANY. Signed trade and payments agreement in Buenos Aires. *B. I. N.*, Oct. 11, 1934, p. 14.
- 29 CANADA—FRANCE. Signed trade agreement supplementary to that of 1933. *N. Y. Times*, Sept. 30, 1934, p. 17.
- 30 GREAT BRITAIN—PARAGUAY. Signed supplementary convention on extradition in respect of the United Kingdom, Australia, New Zealand and Union of South Africa. *Cmd.* 4674.
- October, 1934
- 2 FINLAND—GERMANY. Signed clearing agreement in Berlin. *B. I. N.*, Oct. 11, 1934, p. 18.
- 5-6 INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW. Governing body met at Rome and approved two draft proposals. *L. N. M. S.*, Oct., 1934, p. 246.
- 5 JAPAN—PERU. Peru notified Japan of intention to denounce commercial treaty ratified Feb. 19, 1930. *N. Y. Times*, Oct. 18, 1934, p. 8.
- 6 CHINA. Agreement initialed by Ministry of Railways, the British and Chinese Corporation and the China Development Finance Corporation, for a loan of 16 million dollars. *B. I. N.*, Oct. 11, 1934, p. 15.
- 9 ALEXANDER, KING OF YUGOSLAVIA. Assassinated at Marseille, France; succeeded by Peter II. *Cur. Hist.*, Nov. 1934, p. 243. *Foreign Affairs*, Jan., 1935, p. 204.
- 9 INTERNATIONAL AERONAUTICAL FEDERATION. Opened 34th congress in Chamber of Commerce of the United States in Washington. *Press Releases*, Oct. 13, 1934, p. 246.
- 10 ESTONIA—UNITED STATES. Signed supplementary extradition treaty in Washington. *Press Releases*, Oct. 13, 1934, p. 247. *T. I. B.*, Oct., 1934, p. 7.
- 10 LATVIA—UNITED STATES. Signed supplementary extradition treaty in Washington. *Press Releases*, Oct. 13, 1934, p. 247. *T. I. B.*, Oct., 1934, p. 7.

- 10 SAN MARINO—UNITED STATES. Signed supplementary extradition treaty in Washington. *Press Releases*, Oct. 13, 1934, p. 247. *T. I. B.*, Oct., 1934, p. 7.
- 10 SPAIN—UNITED STATES. President Roosevelt issued proclamation extending benefits of Section 1 (e) of the Copyright Act of the United States, approved March 4, 1909, to nationals of Spain. *Press Releases*, Oct. 20, 1934, p. 266. *T. I. B.*, Oct., 1934, p. 14.
- 11 GERMANY—POLAND. Compensation agreement signed at Warsaw, involving an exchange of goods to a total value of 20 million marks. *B. I. N.*, Oct. 25, 1934, p. 22.
- 17 TURKEY—UNITED STATES. Turkey will pay American citizens \$1,300,000 for property seized during the World War, as result of findings announced by the Turko-American Mixed Claims Commission. Claims of 405 Americans living in Turkey were examined by the arbitrators. Decision must be approved by the two governments before being published. *Wash. Post*, Oct. 18, 1934, p. 1. *B. I. N.*, Nov. 22, 1934, p. 30.
- 19-20 GOLD BLOC CONFERENCE. Delegates of five of the seven European nations comprising the gold bloc met in Geneva, Sept. 24-25. Delegates of all seven countries held conference in Brussels Oct. 19-20, and adopted protocol confirming determination to maintain present gold parties. Permanent bureau to be established in Brussels. Text: *Times* (London), Oct. 22, 1934, p. 14. *N. Y. Times*, Oct. 21, 1934, p. 5.
- 22 INDIA—JAPAN. Exchanged ratifications of convention regarding commercial relations, signed July 12, 1934. *G. B. Treaty Series*, No. 31 (1934), *Cmd.* 4735.
- 22 PERMANENT COURT OF INTERNATIONAL JUSTICE. Opened 33d session to consider Oscar Chinn case (fluvial transport on waterways of Belgian Congo). *L. N. M. S.*, Sept., 1934, p. 253.
- 23 to Nov. 7 NAVAL DISARMAMENT. First conversations, preliminary to naval conference, 1935, were held in London, June 18 to July 4, between British Government and the United States. Delegations from Japan and the United States participated in talks resumed in London on Oct. 24. Discussions came to a standstill by the end of October. Premier MacDonald proposed compromise plan on Nov. 7 to end limitation, which Japan refused to accept. *N. Y. Times*, Oct. 24-Nov. 9, 1934. *Cur. Hist.*, Dec., 1934, p. 327.
- 24-27 INTERNATIONAL INSTITUTE OF AGRICULTURE. 12th general meeting held in Rome with representatives of 68 countries, including the United States. Trade barriers, commercial treaties and planned world economy were discussed. *N. Y. Times*, Oct. 23-Oct. 28, 1934.
- 24 to Nov. 5 MANCHURIAN OIL MONOPOLY. On Oct. 24, American and British Governments announced that they and the Netherlands had made protests to Japan against oil sales monopoly plan in Manchuria as outlined to the agents on Oct. 19. On Nov. 5, Foreign Minister Hiroto said that Japan had been informed that monopoly plan would not violate the Open Door pledges and advised that complaints of protesting oil companies be taken direct to Manchukuo Government. *Cur. Hist.*, Dec., 1934, p. 381.
- 25 TURKEY—UNITED STATES. Signed final agreement at Istanbul for settlement of claims of nationals of each country against the other, embraced within the agreement arranged by exchange of notes of Dec. 24, 1923 and Feb. 17, 1927. Text: *Press notice*, Dec. 19, 1934.

- 26 GREAT BRITAIN—POLAND. Signed agreement at Warsaw relative to commercial travellers. *Poland*, No. 1 (1934), *Cmd.* 4688.
- 30 to November 2 BALKAN ENTENTE. Permanent council of signatories of Balkan Pact (Greece, Rumania, Turkey and Yugoslavia) held conference in Angora, Turkey, for discussion of general political situation as affecting those countries, statutes for the Balkan Entente were drawn up and an Economic Council created to keep the four governments informed on matters of political and economic nature. *Times*, (London), Oct. 31 and Nov. 3, 1934, pp. 13 and 11. *N. Y. Times*, Oct. 31, 1934, p. 7.
- 31 ESTONIA—RUSSIA. Signed trade agreement to supplement agreement of May 17, 1929, to remain in force for three years. *B. I. N.*, Nov. 8, 1934.
- 31 HUNGARY—POLAND. Signed cultural pact at Warsaw. *Wash. Post*, Oct. 22, 1934, p. 2. *B. I. N.*, Oct. 25, 1934, p. 22.
- November, 1934
- 1 GERMANY—GREAT BRITAIN. Initialed agreement for settling trade dispute and liquidation of outstanding debts. Summary: *N. Y. Times*, Nov. 2, p. 1. *Times* (London), Nov. 2, 1934, p. 14. *Cmd.* 4726.
- 3 LETICIA AGREEMENT. Peruvian Congress approved "Protocol of friendship and coöperation" signed by Colombia and Peru on May 24, 1934. *N. Y. Times*, Nov. 4, 1934, II, 6. *Cur. Hist.*, Dec., 1934, p. 349. See editorial comment in this JOURNAL, *supra*, p. 94.
- 4 LENA GOLDFIELDS' AGREEMENT. Compromise agreement signed in Moscow, whereby three million pounds is awarded to the company, instead of the 13 million pounds in the original award. 50,000 pounds will be paid by Russia after due ratification of agreement by both parties, the remainder in instalments every six months over a twenty-year period ending in 1954. *Times* (London), Nov. 6, 1934, p. 13. *C. S. Monitor*, Nov. 5, 1934, p. 4.
- 5 GREAT BRITAIN—NORWAY. Agreement to establish joint commission to investigate fishery disputes, signed at London. *Times* (London), Nov. 6, 1934, p. 13. Text: *Cmd.* 4729.
- 6 FOREIGN INTERCOURSE. Departmental order No. 601 issued by Department of State concerning employment of American citizens as counsel by foreign governments. Text: *Press Releases*, Nov. 10, 1934, p. 290. *World Affairs*, Dec., 1934, p. 250.
- 13 YUGOSLAV MEMORANDUM. Yugoslavia presented urgent demand to League of Nations for action on activities of Hungarian nationalists in connection with assassination of King Alexander. Text: *N. Y. Times*, Nov. 25, 1934, IV, 2.
- 14 AUSTRIA—FRANCE. Signed new commercial agreement at Paris. *Times* (London), Nov. 15, 1934, p. 13.
- 14 OIL MONOPOLY LAW. Promulgated in Manchukuo, also a law providing for purchase of firms in the oil business. *B. I. N.*, Nov. 22, 1934, p. 27.

## INTERNATIONAL CONVENTIONS

- AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol of amendments. Paris, June 15 and Dec. 11, 1929.  
*Adhesion*: Liechtenstein and Switzerland. *T. I. B.*, Sept., 1934, p. 8.

AIRCRAFT ATTACHMENT. Rome, May 29, 1933.

*Ratification deposited:* Spain (and Spanish Zone of Protectorate of Morocco). *T. I. B.*, Aug., 1934, p. 7.

AIRCRAFT LIABILITY TO THIRD PARTIES ON THE SURFACE. Rome, May 29, 1933.

*Ratification deposited:* Spain, including Moroccan Protectorate. *T. I. B.*, Aug., 1934, p. 7.

AIR TRAFFIC. Warsaw, Oct. 12, 1929.

*Adhesion deposited:* United States, July 31, 1934. *T. I. B.*, Aug., 1934, p. 7.

*Ratification deposited:* U. S. S. R. *T. I. B.*, Oct., 1934, p. 13.

ARGENTINE ANTI-WAR PACT. Rio de Janeiro, Oct. 10, 1933.

*Adhesion:* Dominican Republic.

*Adhesion deposited:* United States, Aug. 10, 1934. *T. I. B.*, Aug., 1934, p. 2.

AUTOMOTIVE TRAFFIC. Washington, Oct. 6, 1930.

*Ratification deposited:* Honduras. *T. I. B.*, Aug., 1934, p. 17.

CIVIL WAR. Havana, Feb. 20, 1928.

*Ratification deposited:* Cuba. July 18, 1934. *T. I. B.*, Aug., 1934, p. 2.

CONGO (General Act of Berlin). Berlin, Feb. 26, 1885.

*Revision.* Saint-Germain-en-Laye, Sept. 10, 1919.

*Ratification deposited:* United States. *T. I. B.*, Oct., 1934, p. 6.

COPYRIGHT. Berne, Sept. 9, 1886. Revision. Rome, June 2, 1928.

*Adhesions:*

Belgium. *Droit d'auteur*, Oct. 15, 1934, p. 109.

Morocco, Monaco, Tunis. *Droit d'auteur*, Nov. 15, 1934, p. 121.

COUNTERFEITING CURRENCY AND PROTOCOL. Geneva, April 20, 1929.

*Ratification:* Poland (on behalf of Danzig) with reservations. *T. I. B.*, Sept., 1934, p. 12.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

*Ratification:* Monaco. *L. N. O. J.*, Oct., 1934.

EIGHT-HOUR DAY. Washington, Nov. 28, 1919.

*Ratification:* Cuba. *L. N. O. J.*, Oct., 1934.

EXTRADITION. Montevideo, Dec., 26, 1933.

*Ratification:* Dominican Republic. *T. I. B.*, Oct., 1934, p. 7.

FOREIGN ARBITRAL AWARDS. Geneva, Sept. 26, 1927.

*Promulgation:* Malta. Aug. 13, 1934. *T. I. B.*, Sept., 1934, p. 9.

GENERAL ACT FOR PACIFIC SETTLEMENT. Geneva, Sept. 26, 1928.

*Adhesion:* Switzerland, Nov. 7, 1934. *B. I. N.*, Nov. 22, 1934, p. 29.

GERMAN PEACE TREATY. Versailles, June 28, 1919.

Amendments to Art. 393. Geneva, Nov. 2, 1922. Came into force on June 4, 1934, as result of ratification by states composing the Council of the League of Nations and by three-fourths of the members. *I. L. O. B.*, Oct. 10, 1934, p. 62.

LOAD LINE CONVENTION. London, July 5, 1930.

*Ratification deposited:* Mexico. *T. I. B.*, Aug., 1934, p. 14.

MARITIME MORTGAGES. Brussels, Aug. 25, 1924.

*Adhesion deposited:* Finland. *T. I. B.*, Aug., 1934, p. 15.

## MULTILATERAL COMMERCIAL AGREEMENT INCLUDING FAVORED-NATION CLAUSE.

Open for signature to all nations by the Pan American Union. July 15, 1934. Text: *P. A. U.*, Oct., 1934, p. 712.

*Signatures:*

United States. Sept. 20, 1934. *Press Releases*, Sept. 22, 1934, p. 213. *T. I. B.*, Sept., 1934, p. 9.

Panama. Sept. 29, 1934. *T. I. B.*, Sept., 1934, p. 10.

Cuba. *T. I. B.*, Oct., 1934, p. 14.

## NARCOTICS. Geneva, July 13, 1931.

*Accession:* Norway. *L. N. O. J.*, Oct., 1934.

*Ratifications:*

Greece. *T. I. B.*, Sept., 1934, p. 7.

Honduras and Venezuela. *L. N. O. J.*, Oct., 1934.

## NATIONALITY OF WOMEN CONVENTION. Montevideo, Dec. 26, 1933.

*Ratifications deposited:*

United States. July 13, 1934.

Chile. Aug. 29, 1934. *T. I. B.*, Oct., 1934, p. 8.

Text: *Equal Rights*, Dec. 1, 1934, p. 349.

## OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

*Ratification:* Cuba. Sept. 20, 1934. *L. N. O. J.*, Oct., 1934.

## OPIUM CONVENTION, 2d. Geneva, Feb. 19, 1925.

*Ratification deposited:* Honduras. Sept. 21, 1934. *T. I. B.*, Sept. 1934, p. 7; *L. N. O. J.*, Oct., 1934.

## PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924. Protocol. Lima, Oct. 19, 1927.

*Promulgation:* Argentina. June 30, 1934. *T. I. B.*, Sept., 1934, p. 7.

## PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva. Dec. 16, 1920.

*Ratification:* Hungary. Aug. 9, 1934. *L. F. O. J.*, Sept., 1934.

*Signatures:*

Abyssinia and Greece. *L. N. O. J.*, Oct., 1934, p. 1181.

## POSTAL CONVENTION. Cairo, March 20, 1934.

*Signature:* *L'Union postale*, June, 1934.

*Ratification:* United States, Oct. 4, 1934. *T. I. B.*, Oct., 1934, p. 16.

## POSTAL UNION OF THE AMERICAS AND SPAIN. Madrid, Nov. 10, 1931.

*Ratification deposited:* Colombia. July 27, 1934. *T. I. B.*, Sept., 1934, p. 12.

## PUBLIC HEALTH OFFICE. Rome, Dec. 9, 1907.

*Adhesion:* Iraq. *T. I. B.*, Aug. 1934, p. 5.

## RENUNCIATION OF WAR. Paris, Aug. 27, 1922.

*Adhesion:* Argentina. Oct. 30, 1934. *B. I. N.*, Nov. 8, 1934.

## SAFETY AT SEA. London, May 31, 1929.

*Accession:* Poland. *T. I. B.*, Aug., 1934, p. 6.

## SANITARY CONVENTION AND PROTOCOL. Paris, June 21, 1926.

*Ratification deposited:* Danzig. *T. I. B.*, Aug., 1934, p. 6.

## SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933.

*Text and signatures:* *T. I. B.*, Sept., 1934, p. 17-40.

## SHIP-OWNERS' LIABILITY. Brussels, Aug. 25, 1924.

*Adhesion deposited:* Finland. *T. I. B.*, Aug., 1934, p. 14.

SLAVERY. Geneva, Sept. 25, 1926.

*Accession:* Mexico. Sept. 8, 1934. *L. N. O. J.*, Oct., 1934.

TARIFF TRUCE. London, May 12, 1933.

*Withdrawal:* Afghanistan and Turkey. *T. I. B.*, Aug., 1934, p. 10.

TELECOMMUNICATIONS CONVENTION. Madrid. Dec. 9, 1932.

*Ratifications deposited:*

Germany. June 29, 1934.

Spain. June 27, 1934. *T. I. B.*, Aug., 1934, p. 15.

Persia. July 1, 1934.

Switzerland. Aug. 1, 1934. *T. I. B.*, Sept., 1934, p. 13.

TORPEDO SALVAGE. Paris. June 12, 1934.

*Text:* *G. B. Treaty Series*, No. 26 (1934), *Cmd.* 4709. *Irish Treaty Series*, No. 11 (1934).

TRADE MARK AND COMMERCIAL PROTECTION CONVENTION. Protocol on trademark registration, Washington, Feb. 20, 1929.

*Ratification:* Nicaragua. *T. I. B.*, Oct., 1934, p. 15.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.

*Ratification:* China. *T. I. B.*, Sept., 1934, p. 12.

WEIGHT OF PACKAGES ON VESSELS. Geneva, June 21, 1929.

*Ratification:* Lithuania. *L. N. O. J.*, Oct., 1934.

WORKMEN'S COMPENSATION FOR ACCIDENTS (Equality of treatment). Geneva, June 5, 1925.

*Ratification:* Lithuania. *L. N. O. J.*, Oct., 1934.

WORKMEN'S COMPENSATION FOR ACCIDENTS IN LOADING AND UNLOADING SHIPS. Geneva, June 21, 1929. Revision. April 27, 1932.

*Ratification:* Spain. July 28, 1934. *L. N. O. J.*, Sept., 1934.

M. ALICE MATTHEWS

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Viscount Sankey, L.C., Lord Atkin, Lord Tomlin, Lord Macmillan, and Lord Wright)

IN RE A REFERENCE UNDER THE JUDICIAL COMMITTEE ACT, 1833, IN RE PIRACY  
JURE GENTIUM \*

July 26, 1934

International Law—Piracy *jure gentium*—Actual robbery not an essential element.

Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*.

By an Order in Council, dated November 10, 1933, the following question was referred to their Lordships for their hearing and consideration. "Whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*." The circumstances giving rise to the reference are set out in the judgment of the Board delivered by the Lord Chancellor.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Wilfrid Lewis, on behalf of the Attorney-General, supported the view that actual robbery was not an essential element in the crime of piracy *jure gentium*; Sir Leslie Scott, K.C., and Mr. Kenelm Preedy, for the Secretary of State for the Colonies, supported the contrary view.

The Lord Chancellor, in giving the judgment of the Board, said:—On January 4, 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape, and a chase ensued during which the pursuers came within 200 yards of the cargo junk. The chase continued for over half an hour, during which shots were fired by the attacking party, and while it was still proceeding the s.s. *Hang Sang* approached and subsequently also the s.s. *Shui Chow*. The officers in command of these merchant vessels intervened and, through their agency, the pursuers were eventually taken in charge by the commander of *H.M.S. Somme*, which had arrived in consequence of a report made by wireless. They were brought as prisoners to Hong-kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law: "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred." The full Court of Hong-kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy, and in the result the accused were acquitted.

\* The Times Law Reports, Oct. 19, 1934, Vol. 51, p. 12. Reported by Charles Clayton, Esq., Barrister-at-Law.

The decision of the Hong-kong Court was final, and the present proceedings are in no sense an appeal from that court, whose judgment stands.

On November 10, 1933, His Majesty in Council made the following order: "The question whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* is referred to the Judicial Committee for their hearing and consideration."

It is to this question that their Lordships have applied themselves, and they think it will be convenient to give their answer at once and then to make some further observations on the matter. The answer is as follows:

"Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*."

In considering such a question the Board is permitted to consult and act on a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament, and the decisions of municipal courts, and last, but not least, opinions of juriconsults or text-book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive, and no judiciary, though in a certain sense there is now an international judiciary in The Hague Tribunal, and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis*, and as such he is justiciable by any State anywhere. Grotius (1583-1645) *De Jure Belli ac Pacis*, Vol. II, cap. 20, section 40.

Their Lordships have been referred to a very large number of Acts of Parliament, decided cases, and opinions of juriconsults or text-book writers, some of which lend colour to the contention that robbery is a necessary ingredient of piracy, others to the opposite contention. Their Lordships do not propose to comment on all of them, but it will be convenient to begin the

present discussion by referring to the Act of Henry VIII, cap. 15, in the year 1536, which was entitled "An Act for the punishment of pirates and robbers of the sea." Before that Act the jurisdiction over pirates was exercised by the High Court of Admiralty in England and that court administered the civil law. The civilians, however, had found themselves handicapped by some of their canons of procedure, as, for example that a man could not be found guilty unless he either confessed or was proved guilty by two witnesses. The Act recites the deficiency of the Admiralty jurisdiction in the trial of offences according to the civil law, and after referring to "all treasons, felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea, &c." (it is not necessary to set out the whole of it), proceeds to enact that all offences committed at sea, &c., shall be tried according to the common law under the King's commission, to be directed to the Admiralty and others within the realm.

Many of the doubts and difficulties inherent in considering subsequent definitions of piracy are probably due to a misapprehension of that Act. It has been thought, for example, that nothing could be piracy unless it amounted to a felony as distinguished from a misdemeanour, and that, as an attempt to commit a crime was only a misdemeanour at common law, an attempt to commit piracy could not constitute the crime of piracy because piracy is a felony as distinguished from a misdemeanour. This mistaken idea proceeds upon a misapprehension of the Act. In Coke's (1532-1634) *Institutes*, Part III, edition 1809, after a discussion on felonies, robberies, murders, and confederacies committed in or upon the sea, it is stated (page 112) that the statute did not alter the offence of piracy or make the offence felony, but "leaveth the offence as it was before this Act, viz., felony only by the civil law, but giveth a mean of triale by the common law, and inflicteth such pains of death, as if they had been attainted of any felony, etc., done upon the land. But yet . . . the offence is not altered, for in the indictment upon this statute the offence must be alleged upon the sea; so as this act inflicteth punishment for that, which is a felony by the civil law, and no felony whereof the common law taketh knowledge."

The conception of piracy according to the civil law is expounded by Molloy (1646-90) *De Jure Maritimo et Navali* or *A Treatise of Affairs Maritime and of Commerce*.

That book was first published in 1676 and the ninth edition in 1769. Chapter IV is headed "Of Piracy." The author defines a pirate as "a Sea-Thief or *Hostis humani generis*, who to enrich himself either by surprize or open force sets upon merchants and others traders by sea." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Thus in para. xiii he says: "So likewise if a Ship shall be assaulted by Pirates, and in the Attempt the Pirates shall be overcome, if the Captors bring them to the next port and the Judge openly rejects the Trial, or the Captors cannot wait for the Judge without cer-

tain peril and loss, Justice may be done upon them by the Law of Nature, and the same may be there executed by the Captors." Again in para. xiv he puts the case: "If a pirate at Sea assault a Ship, but by force is prevented entering her," and goes on to distinguish the rule as to accessories at the common law and by the law marine. A somewhat similar definition of a pirate is given by the almost contemporary Italian jurist Casaregi, who wrote in 1670, and says: "Proprie pirata ille dicetur qui sine patentibus alicujus principis expropria tantum et privata auctoritate per mare discurret depredante causa." But in certain trials for piracy held in England under the Act of Henry VIII a narrower definition of piracy seems to have been adopted.

Thus in 1696 the trial of Joseph Dawson and Others took place. It is reported in State Trials, Vol. XIII, col. 451. The prisoners were indicted for "feloniously and piratically taking and carrying away, from persons unknown, a certain ship called the Gunsway . . . upon the high seas, ten leagues from the Cape St. Johns, near Surat in the East Indies." The court was comprised of Sir Charles Hedges, then Judge in the High Court of Admiralty, Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward, and a number of other judges. Sir Charles Hedges gave the charge to the grand jury. In it he said: "Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without legal authority, this is robbery and piracy." Dawson's case (*supra*) was described as the sheet anchor for those who contend that robbery is an ingredient of piracy. It must be remembered, however, that every case must be read *secundum subjectam materiam* and must be held to refer to the facts under dispute.

In Dawson's case (*supra*) the prisoners had undoubtedly committed robbery in their piratical expeditions. The only function of the Chief Judge was to charge the grand jury and in fact to say to them: "Gentlemen, if you find the prisoners have done these things, then you ought to return a true bill against them." The same criticism applies to certain charges given to grand juries by Sir Leoline Jenkins (1623-85). Judge of the Admiralty Court (1685). See the *Life of Leoline Jenkins*, Vol. IV, p. xciv. It cannot be suggested that these learned judges were purporting to give an exhaustive definition of piracy, and a moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say, of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow-passenger, and was therefore liable to the penalty of death.

That is too wide a definition which would embrace all acts of plunder and violence in degree sufficient to constitute piracy simply because done

on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority, and the offender were secured and confined by the master of the vessel, to be taken home for trial—this state of things would not authorize seizure and trial by any nation that chose to interfere, or within whose limits the offender might afterwards be found (Dana's *Wheaton*, 193, note 83, quoted in Moore's *Digest of International Law* (Washington, 1906), article "Piracy," p. 953).

But over and above that, we are not now in the year 1696; we are now in the year 1934. International law was not crystallized in the seventeenth century, but is a living and expanding code.

In his treatise on international law the English text-book writer Hall (1835-94) says, at page xxv of his preface to the third edition (1889):

Looking back over the last couple of centuries, we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken a firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged and it has been gradually enlarged within the memory of living men.

Again, another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport of which Sir Charles Hedges in 1696 could have had no possible idea.

A definition of piracy which appears to limit the term to robbery on the high seas was put forward by that eminent authority Hale (1609-76) in his *Pleas of the Crown*, edition 1736, Part I, cap. 27, p. 355, where he states: "It is out of the question, that piracy upon the statute is robbery." It is not surprising that subsequent definitions proceed on these lines.

Hawkins (1673-1746), *Pleas of the Crown* (1716), seventh edition, 1795, Vol. I, defines a pirate rather differently, at page 267: "A pirate is one who to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea to spoil them of their goods or treasure." This does not necessarily import robbing.

Blackstone (1723-80), twentieth edition, Book IV, p. 76, states: "The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon the land, would have amounted to felony there."

East's *Pleas of the Crown* (1803), Vol. II, p. 796, defines the offence of piracy by common law as the commission "of those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to felony there." This definition would exclude an attempt at piracy, because

an attempt to commit a crime is, with certain exceptions, not a felony but a misdemeanour.

Their Lordships were also referred to Scottish text-book writers, including Hume (1757–1838), *Scottish Criminal Law* (1797), and Alison (1792–1867), *Scottish Criminal Law* (1832), where similar definitions are to be found. It is sufficient to say with regard to these English and Scottish writers that, as was to be expected, they followed in some cases almost verbatim the early concept, and the criticism upon them is: (1) that it is obvious that their definitions were not exhaustive; (2) that it is equally obvious that there appears to be from time to time a widening of the definition so as to include facts previously not foreseen; and (3) that they may have overlooked the explanation of the statute of Henry VIII as given by Coke and quoted above, and have thought of piracy as felony according to common law, whereas it was felony by civil law.

In *Archbold's Criminal Pleading*, twenty-eighth edition, 1931, will be found a full conspectus of the various statutes on piracy which have been from time to time passed in this country defining the offence in various ways and creating new forms of offence as coming within the general term piracy. These, however, are immaterial for the purpose of the case because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy *jure gentium*. When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel without any commission from any State could attack and kill everybody on board another vessel sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law. This appears to be recognized in the *Digest of Criminal Law* by the distinguished writer Sir James Fitzjames Stephen (1829–94), seventh edition, 1926, at p. 102. At the end of the article on piracy it is stated that: "It is doubtful whether persons cruising in armed vessels with intent to commit piracy are pirates or not"; but in a significant footnote it is added that: "The doubt expressed at the end of the article is founded on the absence of any express authority for the affirmative of the proposition, and on the absurdity of the negative."

Murray's Oxford Dictionary (1909) defines a pirate as "one who robs and plunders on the sea, navigable rivers, &c., or cruises about for that purpose."

It may now be convenient to turn to American authorities, and first of all Kent (1826). In his Comm. I, 183, he calls piracy "a robbery or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*" in the spirit and intention of universal hostility.

Wheaton, writing in 1836, *Elements*, Pt. II, cap. 2, para. 16, defines piracy as being the offence of "depredating on the seas, without being authorized by any foreign State or with commissions from different sovereigns at war with

each other." This enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing the high seas without the authority or commission of any State. This has been frequently applied in cases where insurgents had taken possession of a vessel belonging to their own country and the question arose what authority they had behind them. See the American case of the *Ambrose Light* (25 Fed. Rep. 408). Another instance is the case of the *Huascar* (Parl. Papers, Peru, No. 1 (1877)). In 1877 a revolutionary outbreak occurred at Callao, in Peru, and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal from one of them without payment, and forcibly took two Peruvian officials from on board another where they were passengers. The British Admiralty justly considered the *Huascar* was a pirate and attacked her.

In Moore's *Digest of International Law* (1906) (*ubi supra*), Vol. II, p. 953, a pirate is defined as "one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it. The pirate is a sea-brigand. He has no right to any flag and is justiciable by all."

Time fails to deal with all the references to the works of foreign jurists to which their Lordships' attention was directed. It will be sufficient to select a few examples.

Ortolan (1802-73), a French jurist, and professor at the University of Paris, says, *Dip. de la Mer*, Book II, ch. xi: "Les pirates sont ceux, qui courent les mers de leur propre autorité, pour y commettre des actes de déprédation pillant à main armée les navires de toutes les nations."

Bluntschli (1808-81), a Swiss jurist and a professor at Munich and Heidelberg, published in 1870 *Le Droit International Codifié*, which, in Art. 343, lays down: "Sont considérés comme pirates les navires qui sans l'autorisation d'une puissance belligérante cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui."

Calvo (1824-1906), an Argentine jurist and Argentine Minister at Berlin, para. 1,134, defines piracy: "Tout vol ou pillage d'un navire ami, toute déprédation, toute acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger soit en temps de paix soit en temps de guerre."

An American case strongly relied on by those who contend that robbery is an essential ingredient of piracy is that of the *United States v. Smith* (5 Wheaton, 153). Mr. Justice Story delivered the opinion of the court and there states (page 161): "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery, or forcible depredation upon the sea, *animo furandi*, is piracy." He would be a bold lawyer to dispute the authority of so great a jurist, but the criticism upon that statement is that the learned judge was considering a case where the prisoners charged had possessed themselves of the vessel, the *Irresistible*, and had

plundered and robbed a Spanish vessel. There was no doubt about the robbery, and though the definition is unimpeachable as far as it goes it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy. The case, however, is exceptionally valuable because from pages 163 to 180 of the report it tabulates the opinions of most of the writers on international law up to that time. But with all deference to so great an authority the remark must be applied to Mr. Justice Story in 1820 that has already been applied to Sir Charles Hedges in 1696, which is that international law has not become a crystallized code at any time, but is a living and expanding branch of the law.

In a later American decision, *United States v. The Malek Adhel* (2 How., 210), it was said, at page 232:

If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression, in the sense of the law of nations and of the Act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.

Having thus referred to the two cases, Dawson, 1696 (*supra*), and Smith, 1820 (*supra*), which are typical of one side of the question, their Lordships will briefly refer to two others from which the opposite conclusion is to be gathered.

It will be observed that both of them are more recent. The first is the decision in the case of *The Serhassan* (2 Robinson's Adm. Cas. 354), decided in the English High Court of Admiralty by that distinguished Judge Dr. Lushington (1782-1873) in 1845. It was on an application by certain officers for bounty which, under the statute 6 Geo. IV, cap. 49, was given to persons who captured pirates, and the learned judge said (it is not necessary to detail all the facts of the case for the purpose of the present opinion): "The question which I have to determine is whether or not the attack which was made upon the British pinnace and the two other boats constituted an act of piracy on the part of the prahns, so as to bring the persons who were on board within the legal denomination of pirates." He held it was an act of piracy and awarded the statutory bounty. It is true that that was a decision under the special statute under which the bounties were claimed, but it will be noted that there was no robbery in that case. What happened was that the pirates attacked, but were themselves beaten off and captured. A similar comment may be made on the case in 1853 of *The Magellan Pirates* (1 Spink Eccl. and Adm. Reports, 81), where Dr. Lushington said: "It was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes [*i.e.*, robbery and murder] had intended to rob on the high seas or to murder on the high seas indiscriminately."

Finally, there is the American case of the *Ambrose Light* (*supra*), where it was decided by a Federal court that an armed ship must have the authority of a State behind it, and if it has not got such an authority it is a pirate even though no act of robbery has been committed by it.

It is true that the vessel in question was subsequently released on the ground that the Secretary of State had by implication recognized a state of war, but the value of the case lies in the decision of the court.

Their Lordships have dealt with two decisions by Dr. Lushington. It may here be not inappropriate to refer to another great English Admiralty judge and juriconsult, Sir Robert Phillimore (1810-85). In his *International Law*, third edition, Vol. I (1879), he states, at page 488: "Piracy is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury."

Lastly, Hall, to whose work on international law reference has already been made, states, on page 314 of the eighth edition, 1924:

The various acts which are recognized or alleged to be piratical may be classed as follows:

Robbery or attempt at robbery of a vessel by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use.

Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny (1847-1930), *Outlines of Criminal Law*, at page 320, where he says that piracy is "any armed violence at sea which is not a lawful act of war," although even this would include a shooting affray between two passengers on a liner, which could not be held to be piracy.

It would, however, correctly include those acts which, so far as their Lordships know, have always been held to be piracy—that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. Hall (*ubi supra*) put such a case in the passage just cited; it is clear from his words that it is not less a case of piracy because the attempt fails.

Before leaving the authorities it is useful to refer to a most valuable treatise on the subject of piracy contained in *The Research into International Law by the Harvard Law School*, published at Cambridge, Mass., in 1932. In it nearly all the cases, nearly all the statutes, and nearly all the opinions are set out on pages 749 to 1,013.

In 1926 the subject of piracy engaged the attention of the League of Nations, who scheduled it as one of a number of subjects the regulation of which by international agreement seemed to be desirable and realizable at the present moment. Consequently, they appointed a subcommittee of their Committee of Experts for the Progressive Codification of International Law and requested the subcommittee to prepare a report on the question.

An account of the proceedings is contained in the League of Nations docu-

ment C 196, M 70, 1927 V. The subcommittee was presided over by the Japanese jurist Mr. Matsuda, the Japanese Ambassador in Rome, and in their report at page 116 they state: "According to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons."

The report was submitted to a number of nations and an analysis of their replies will be found at page 273 of the League of Nations document. A number of States recognized the possibility and desirability of an international convention on the question. The replies of Spain (page 154), of Greece (page 168), and especially of Rumania (page 208) deal at some length with the definition of piracy. Rumania adds, page 203:

Mr. Matsuda, however, maintains in his report that it is not necessary to premise explicitly the existence of a desire for gain, because the desire for gain is contained in the larger qualification "for private ends." In our view, the act of attacking for private ends does not necessarily mean that the attack is inspired by a desire for gain.

It is quite possible to attack without authorization from any State and for private ends, not with a desire for gain but for vengeance or for anarchistic or other ends.

The above definition does not in terms deal with an armed rising of the crew or passengers with the object of seizing the ship on the high seas.

However that may be, their Lordships do not themselves propose to hazard a definition of piracy.

They remember the words of M. Portalis, one of Napoleon's commissioners, who said:

We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. . . . A new question springs up: then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic. (Quoted by Lord Halsbury, L.C., in Halsbury's *Laws of England*, Introduction, p. ccxi.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older juriconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and, having examined all the various cases, all the various statutes, and all the opinions of the various juriconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning—namely, that actual robbery is not an essential element in the crime of piracy *jure gentium*, and that

a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.

## SUPREME COURT OF THE UNITED STATES

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM CO. v. CHARLES W. COX, LTD.\*

*Decided January 15, 1934*

The Webster-Ashburton Treaty of 1842 declares that "all water communications and all the usual portages along" the international boundary line, as established by the treaty "from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the citizens and subjects of both countries." Pigeon River is one of the waters traversed by the line, and Grand Portage was one of several portages circuiting impassable falls and rapids in that river which were used in aid of transportation by canoe.

*Held* that the clause does not preclude an improvement of the stream by sluiceways, booms and dams, rendering it capable of transporting timber products—a use theretofore impossible because of the natural obstructions; nor does it prevent the exaction of a non-discriminatory charge for the use of such improvement by the citizens and subjects of both countries.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Pigeon River Improvement, Slide & Boom Company, a Minnesota corporation, brought this action against Charles W. Cox, Limited, a Canadian corporation, to recover tolls for the use of improvements which the Minnesota corporation had made in the Pigeon River. These improvements embraced sluiceways, booms and dams, which were used by the defendant in driving, sluicing and floating timber products. The case was removed to the Federal court, a demurrer to the amended complaint was sustained without leave further to amend, and the judgment of dismissal was affirmed by the Circuit Court of Appeals. 63 F. (2d) 567. The case comes here on appeal.

Pigeon River is a boundary stream between the State of Minnesota and the Province of Ontario, Dominion of Canada, at the northeast corner of Minnesota. The river is a small stream which has its source in lakes on the international boundary and flows in a southeasterly direction along that boundary for about forty miles, discharging at Pigeon Bay into Lake Superior. The boundary is approximately midstream. The defense against the charge of tolls is based upon Article II of the Treaty of 1842—the Webster-Ashburton Treaty—which, after defining the international boundary, provides as follows:<sup>1</sup>

It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

When this treaty was concluded, the lower portion of the Pigeon River was impassable because of falls and rapids. On July 25, 1842, Mr. Ferguson, who had been surveyor to the commissioners under the seventh article of the

\* 291 U. S. Reports, p. 138.

<sup>1</sup> 8 Stat. 574; Malloy, Treaties, Vol. 1, pp. 652, 653.

Treaty of Ghent,<sup>2</sup> thus described this part of the river in response to an inquiry by Mr. Webster:<sup>3</sup> "At the mouth of the Pigeon River, there is probably about three hundred yards in length of alluvial formation; but the river above that, as far as to near Fort Charlotte, runs between steep cut rocks of basaltic or primitive formation, and is a succession of falls and rapids for nearly its whole length—the last cataract, which is within about a mile of its mouth, being almost one hundred feet in height." Below Fort Charlotte on the Pigeon River, communication with Lake Superior was by means of a trail about nine miles long running south of the river, and some distance from it, which was known as the Grand Portage and was so described in the treaty.<sup>4</sup> In Mr. Webster's communication to Lord Ashburton of July 27, 1842, summarizing the understanding which had been reached as to the boundary and setting forth the proposed stipulation as to water communications and portages which was incorporated in the treaty as above quoted, he said: "The broken and difficult nature of the water communication from Lake Superior to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway where necessary for the use of the subjects and citizens of both Governments."<sup>5</sup> At the time of the conclusion of the treaty, this was the highway of commerce, used principally by fur traders, between the Great Lakes and the country to the north and northwest.<sup>6</sup> But the Pigeon River itself prior to the improvements here in question, as alleged in the complaint and admitted by the demurrer, "was at all times incapable of use for the driving, handling and floating of logs, pulp-wood and timber."

Pigeon River Improvement, Slide & Boom Company, which for conven-

<sup>2</sup> 8 Stat. 221, 222; Malloy, *Treaties*, *loc. cit.*, pp. 617, 624.

<sup>3</sup> Sen. Doc., Vol. 1, No. 1, 27th Cong., 3d sess., pp. 104, 105. See also "The Topography and Geology of the Grand Portage," George M. Schwartz, *Minnesota Historical Bulletin*, Vol. 9, p. 27.

<sup>4</sup> "The Pigeon River, which now forms the international boundary at Lake Superior, was, in the days of water transportation, the best natural highway between the Great Lakes or the St. Lawrence system, and the great northwestern section of the continent, with its thousands of lakes and streams draining into Hudson Bay or the Arctic Ocean. But the Pigeon River, through the last twenty miles of its course before it flows into Lake Superior, is so obstructed by falls and by cascades in rocky canyons as to be impossible of navigation. On the Canadian side the land is too mountainous and the distance too great for portaging to be practicable; but on the American side the line of the lake shore is roughly parallel to the river, and about seven or eight miles from the mouth of the river a little bay forms a natural harbor from which a portage of about nine miles over not too difficult country can be made to the Pigeon River above the cascades." "The Story of the Grand Portage," Solon J. Buck, *Minnesota History Bulletin*, Vol. 5, p. 14.

<sup>5</sup> Sen. Doc., Vol. 1, No. 1, 27th Cong., 3rd Sess., p. 61.

<sup>6</sup> For a description of the traffic carried on by means of the Grand Portage, see "The Story of the Grand Portage," *Minnesota History Bulletin*, Vol. 5, pp. 15-26; "Voyages from Montreal through the Continent of North America," Sir Alexander Mackenzie, Vol. 1, pp. lxxi, lxxvii-lxxxii; Henry-Thompson Journals, Elliott Coues, Vol. 1, pp. 6, 7; Wisconsin Historical Collections, Vol. XI, pp. 123-125, note.

ience we may call the Pigeon River Company, was incorporated in 1898 under the General Laws of Minnesota.<sup>7</sup> These laws purported to empower the Pigeon River Company to improve streams by erecting sluiceways, booms, dams and other works; to acquire structures already erected together with necessary rights of way, shore rights, land and lands under water; to operate its works so as to render the driving of logs practicable; and to collect "reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated" on the streams so improved. The company was also authorized, in the case of a boundary stream, to purchase stock in a corporation created in an adjoining State or country for similar purposes upon the same stream, or to unite with such a corporation, upon conditions stated. Acting under this authority, the Pigeon River Company took possession of the portion of Pigeon River within the State of Minnesota and improved it by erecting sluiceways, booms and dams on the Minnesota side of the international boundary.

At the same time, the complaint alleges, the Arrow River & Tributaries, Boom & Slide Company, was organized under the laws of the Dominion of Canada and Province of Ontario with powers and purposes similar to those of the Pigeon River Company, but limited to the portion of the Pigeon River and its tributaries within the Dominion of Canada. This Canadian corporation, under an agreement with the Pigeon River Company, similarly improved the portion of the Pigeon River on the Dominion side of the boundary so that the improvements made by each company "constituted complements the one of the other, and the whole of said improvements rendered the driving of logs thereon reasonably practicable and certain." These improvements, which have since been maintained, were all located below Fort Charlotte on the Pigeon River, with the sole exception of a reservoir dam at the south end of South Fowl Lake.

Adjacent to the lower part of the Pigeon River on the Minnesota side lies the Grand Portage Indian Reservation, extending for a considerable distance along the stream.<sup>8</sup> By the Act of Congress of March 3, 1901,<sup>9</sup> the Pigeon River Company was authorized, under such regulations and conditions as the Secretary of the Interior might prescribe, to "improve the Pigeon River at what is known as the cascades of said river, for the purpose of making said river at said point navigable for floating logs." For that purpose the company was empowered to enter upon unallotted lands and, with the consent of the allottees, upon allotted lands, adjacent to the cascades, of the Grand Portage Indian Reservation and to construct such dams, bulkheads and other works as should be necessary. It was further provided that the river "after being so improved shall be open at all times to the free passage

<sup>7</sup> General Laws of Minnesota, 1878, Chap. 34; 1889, Chap. 221; 1905, Chap. 89; Mason's Minnesota Statutes, 1927, secs. 7550-7552.

<sup>8</sup> 10 Stat. 1110; see, also, H. R. 51st Cong., 1st Sess., Ex. Doc. No. 247, p. 59.

<sup>9</sup> C. 878, 31 Stat. 1455.

of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor.”<sup>10</sup> It does not appear that the Secretary of the Interior prescribed any regulations or conditions in relation to the improvements made by the Pigeon River Company.

Recovery is now sought for the use by the defendant, a Canadian corporation, of these improvements in the years 1928, 1929, and 1930, in driving, sluicing and floating upon the Pigeon River its pulpwood and railway ties. This timber, the defendant says in its argument, was cut from Canadian lands and put into the Arrow River, a tributary in Canada of the Pigeon River, and was floated into the Pigeon River on its way to Lake Superior and Canadian mills. The tolls charged the defendant are alleged in the complaint, and thus admitted, to be the “reasonable and uniform tolls” which the Pigeon River Company had established. No question is raised as to reasonableness or discrimination, the only question being whether in the light of the provision of the treaty any tolls whatever could be charged. The contentions of the defendant are that the Pigeon River is a boundary stream and, as one of the “water communications” described in the treaty, must be kept “free and open” to the use of the citizens and subjects of both countries; that the imposition of tolls is inconsistent with this stipulated immunity and is not justified by the legislation which the Pigeon River Company invokes.

The Circuit Court of Appeals in the instant case followed its earlier decision in *Clark v. Pigeon River Improvement, Slide & Boom Company*, 52 F. (2d) 550, where the court reached the conclusion that the charge of tolls was forbidden by the treaty. The court disagreed with the view advanced by the Pigeon River Company that the words of the treaty “as now actually used” limited the provision as to “free and open” use, expressing the opinion that these qualifying words referred only to the Grand Portage. *Id.*, pp. 555, 556. In support of its conclusion, the Circuit Court of Appeals cited the decision of the Appellate Division of the Supreme Court of Ontario in the case of *Arrow River & Tributaries, Slide & Boom Company, Ltd.*, 66 Ont. L. R. 577; where the court held that the Canadian Company did not have “the right to build upon the bed of the Pigeon River anything which may interfere with the enjoyment of free and open use of it by the citizens of the United States.” After the Circuit Court of Appeals had decided the *Clark* case, the judgment in the case of the *Arrow River Company* was reversed by the Supreme Court of Canada. 1932 Canadian Supreme Court Reports, 495. The latter decision was brought to the attention of the Circuit Court of Appeals in the instant case but the court adhered to its former opinion. 63 F. (2d) pp. 568, 569.

The litigation in Canada presented the question whether the statutes of the Province of Ontario authorized the Canadian Company to construct and maintain works upon the Pigeon River on the Ontario side of the international boundary and to charge tolls upon timber passing through those

<sup>10</sup> See Cong. Rec., 56th Cong., 2d Sess., Vol. 34, pt. 4, p. 3462.

works. It appeared that the Arrow River & Tributaries, Slide & Boom Company, Ltd., had been incorporated in 1922 under the Ontario Companies Act,<sup>11</sup> for the purpose of acquiring or constructing dams, booms and other works to facilitate the transmission of timber down the Arrow River, and its tributaries, and that part of the Pigeon River which is within the Province of Ontario; and that the company had acquired title to, and had extended, works which had been erected by a former corporation formed in 1899 with the same shareholders and directors and with similar objects. The company applied to the District Judge for approval of tolls to be charged for the use of these works, and the respondent in that case, the Pigeon River Timber Company, Ltd., sought an injunction restraining the District Judge from acting upon the application. The Webster-Ashburton Treaty was invoked and it was contended that the provision of the Ontario statute, so far as it purported to authorize the company to charge tolls for the use of its improvements on that river, was "*ultra vires* of the Ontario Legislature." The District Judge refused the injunction for the reason that "treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation." On appeal, the Appellate Division of the Supreme Court of Ontario agreed with that principle but had a different opinion as to the effect of the legislation of Ontario. That court decided that the statute in question applied to lakes and rivers that were wholly within the Province and did not apply to the Pigeon River which was a boundary stream. The reason given for this construction was that the court should not impute to the legislature an intent to authorize a violation of the terms of the treaty, if the statutory provision was capable of another construction. The Supreme Court of Canada reversed this decision of the Appellate Division of the Supreme Court of Ontario, holding that the statute did authorize the construction of the works on the Pigeon River and also the charge of tolls for the use of the improvements, and, as thus construed, was within the competency of the provincial legislature.

In the Supreme Court of Canada three opinions were delivered. Three of the five judges held that the legislation was not in conflict with the terms of the treaty. Of this majority, Judges Rinfret and Smith, in an opinion delivered by the latter, took the view that the right preserved by the provision of the treaty "was the right to continue to use the water communication and portages then in use." They expressly disagreed with the opinion of the Circuit Court of Appeals in the Clark case, *supra*, that the words "as now actually used" applied only to Grand Portage. These judges could not see any reason "for preserving a right to use Grand Portage that would not apply to other portages," and they thought that the language of the provision appeared "to apply to all, and to the water communications, and should be so construed." They added: "What was being dealt with, and what was in the

<sup>11</sup> R. S. O. 1914, c. 178; R. S. O. 1927, c. 218; Lakes and Rivers Improvement Act, R. S. O. 1927, c. 43, secs. 32, 52.

contemplation of the parties, was travel and transportation over the water communications and portages as then used, and there was . . . no thought or intention of dealing with the use of these non-navigable rapids and falls that were not in use and could not be used, the passing of which was provided for by the portages."

Chief Justice Anglin wrote a separate opinion agreeing in the result "largely for the reasons" stated by Judges Rinfret and Smith. He said, however, that he should have "preferred it had the majority of the court seen its way clear to base its decision upon a holding" that the stipulation of the treaty "was merely meant to ensure to the citizens of both countries equality of rights in regard to the water communications, portages, etc., and that it never was intended thereby to provide that in no event should either party to the treaty be at liberty, as regards citizens of its own nationality, to impose tolls for the use of improvements lawfully to be made thereon"; that "where either party to the treaty saw fit to impose tolls upon its own citizens, in regard to such improvements, it should be at liberty to impose like tolls (but none greater) on citizens of the other country for the use of the improvements so made."

Two judges—Judges Lamont and Cannon—delivered an opinion to the effect that "although at the date of the treaty the chief purpose for which these water communications were being used was the transportation by boat or canoe of persons and goods, the clause in question places no limit on the purposes for which they might be used"; that "they are to be 'free and open' to the people of both countries for whatever purpose they may desire to use them as a water communication," and therefore if "they could be used for any purpose which did not necessitate the making of a portage to get past a point of danger," there was "nothing in the clause, or in any other part of the treaty, which would compel the use of the portage in order to have a free passage." These judges thought that to hold otherwise would be "to give too narrow a construction to the language used, and to impute a want of vision to the framers of the treaty." They expressed the opinion that the Pigeon River "from its mouth along both sides of the boundary line, forms part of the 'water communications' which were to be free and open," and that this provision is not consistent with the imposition of tolls for the use of improvements erected in the river. While thus construing the treaty, Judges Lamont and Cannon nevertheless reached the final conclusion that the legislation authorizing the imposition of tolls was applicable and valid. This was in the view that "the legislative competence of a provincial legislature is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed, and could bestow"; that the existence of the treaty does not of itself impose a limitation upon the provincial legislative power; that "the treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power." Hence, it was said, the rights and

privileges given by a treaty are, under Canadian law, enforceable by the courts only where the treaty "has been implemented or sanctioned by legislation rendering it binding upon the subject," and the statute giving authority to impose tolls for the use of the improvements "must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation." While the judges of the Supreme Court of Canada thus differed in the grounds of their judgments, they agreed in the result.

Under this decision in Canada and that of the Circuit Court of Appeals, we have the extraordinary situation that as to these improvements at the same place on the boundary stream—improvements necessarily complementary to each other—the Ontario Company may impose charges upon citizens of the United States for the use of its works on the Canadian side of the line while the Minnesota Company may not charge citizens of Canada for the use of its corresponding works on the Minnesota side.

In deciding the instant case, we think that there are controlling considerations which make it unnecessary to pass broadly upon the significance of the words "free and open" in provisions in treaties relating to the use of navigable streams,—a phrase which with different contexts has been repeatedly used in international engagements.<sup>12</sup> The question here is simply as to the application of these words of the Webster-Ashburton Treaty to this particular boundary stream, the Pigeon River, at points where the river was impassable and hence not used as a means of communication at the time the treaty was made, the travel and transportation of that period, and of earlier times, necessarily seeking the portage by means of which alone it was practicable to secure the desired communication. The words of the clause in question "as then actually used", undoubtedly refer to the Grand Portage but we think there is force in the reasoning of the opinion of Judges Rinfret and Smith in the Supreme Court of Canada that these words were not limited to that portage, and we are not convinced that it was the intention either to preclude an improvement which would make a stream along the boundary available for use theretofore impossible, or to prevent a reasonable and non-discriminatory charge for the use of such an improvement. In the terms of the treaty we find no compelling clarity of prohibition. At best, the clause is ambiguous, and it is appropriate that we should look to the practical construction which has been placed upon it.

With respect to the portion of the stream within the territorial jurisdiction of the State of Minnesota, the legislature of that State authorized the erection

<sup>12</sup> See Treaty of September 3, 1783, between the United States and Great Britain, Art. VIII, Malloy, p. 589; Webster-Ashburton Treaty, 1842, Art. III, Malloy, p. 653; Treaty of Washington, 1871, Arts. XXVI, XXVIII, compare Art. XXVII, Malloy, p. 711; Convention concerning the Boundary Waters between the United States and Canada, 1909, Art. I, U. S. Treaties, Vol. 3, p. 2608; Treaty of Guadalupe Hidalgo, 1848, Arts. VI, VII, Gadsden Treaty, 1853, Art. IV, Malloy, pp. 1111, 1123; Moore, *International Law Digest*, Vol. 1, pp. 625, *et seq.*; Hyde, *International Law*, Vol. 1, secs. 160, *et seq.*; Oppenheim, *International Law*, 4th ed., secs. 178, *et seq.*

of these improvements and the charging of reasonable<sup>13</sup> tolls. In contemplation of improvements of this sort in a stream forming part of the international boundary, the State legislation expressly provided for the uniting of such an enterprise with a similar and complementary project appropriately authorized with respect to the Canadian portion of the stream. In the absence of a violation of treaty, or of conflict with an act of the Congress, there can be no doubt as to the power of the State to establish such an aid to commerce. An undertaking of this character by the State falls within the familiar category of cases in which a State may make reasonable provision for local improvements until its authority is superseded by dominant Federal action.<sup>13</sup> The fact that the stream forms part of the international boundary does not make this principle inapplicable. Where, under Section 9 of the Act of March 3, 1899,<sup>14</sup> the consent of Congress is required for the erection of structures in or over navigable waters not lying wholly within a State, "the act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State"; it merely subjects the exercise of the right "to the further condition of getting from Congress consent to action upon the grant." *International Bridge Co. v. New York*, 254 U. S. 126, 133.

It is not necessary to decide whether, in view of the impassable condition of the portion of the Pigeon River under consideration, the improvements came under the provisions of either Section 9 or Section 10 of the Act of March 3, 1899,<sup>15</sup> as we are of the opinion that the improvements were made with the consent of Congress. By the Act of March 3, 1901<sup>16</sup> (which apparently was not brought to the attention of the Circuit Court of Appeals), the Congress expressly authorized the Pigeon River Company to improve the river in order that it might be rendered navigable for floating logs, to erect dams and other works necessary for that purpose, and to impose a reasonable charge for the passage of all timber save that which was cut from the adjoining Grand Portage Indian Reservation. The fact that this authority directly applied to that part of the Pigeon River known as "the cascades" does not, in our judgment, detract from the significance of the Act as showing the acquiescence of the Congress in the improvements here in question. The authority was given because of the governmental interest in the Indian Reservation adjacent to the Pigeon River, and it is obvious that the works at

<sup>13</sup> *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turek*, 95 U. S. 459; *County of Mobile v. Kimball*, 102 U. S. 691; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Huse v. Glover*, 119 U. S. 543; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288; *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126; *Minnesota Rate Cases*, 230 U. S. 352, 403-405; *International Bridge Co. v. New York*, 254 U. S. 126; *Economy Light & Power Co. v. United States*, 256 U. S. 113; *Newark v. Central Railroad Co.*, 267 U. S. 377.

<sup>14</sup> 30 Stat. 1151.

<sup>15</sup> See *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 707, 708; *Leovy v. United States*, 177 U. S. 621, 628; *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123, 124; *Wisconsin v. Illinois*, 278 U. S. 367, 412, 413.

<sup>16</sup> See Note 9.

the cascades would have been futile if the related portions of the river required for the contemplated flotation of timber were not appropriately improved. The consent of the Congress, running expressly to the Pigeon River Company as a corporation organized under the applicable laws of Minnesota, for the erection of the structures at the cascades where the interests of the Indian Reservation were involved, necessarily implied acquiescence in the action by the State in authorizing the improvements which would accomplish the purpose which the Congress had in view. Nor does it affect the question that the congressional authorization was stated to be subject to such regulations and conditions as the Secretary of the Interior might prescribe. It is not shown that the Secretary has imposed restrictions and the Act did not require him to impose them.

We find no reason for regarding this action as intended to abrogate or modify the provision of the Webster-Ashburton Treaty. So far as the Act of Congress specifically authorized the charging of tolls for the use of the improvements on the Minnesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected. The *Cherokee Tobacco*, 11 Wall. 616, 621; *Head Money Cases*, 112 U. S. 580, 597; *Cook v. United States*, 288 U. S. 102, 120. But the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Chew Heong v. United States*, 112 U. S. 536, 549; *United States v. Payne*, 264 U. S. 446, 449; *Cock v. United States*, *supra*. We think that it is proper to infer that the Congress, in view of the condition of the stream and the purpose of the improvements, did not consider the authority to make them and to impose a reasonable charge for their use, as being inconsistent with the treaty stipulation. We regard the action of the Congress, following that of the State, as a practical construction of the treaty as permitting these works and justifying the charge.

The same may be said of the action of the Province of Ontario in providing for the complementary works on the Canadian side of the boundary and authorizing tolls for their use. While this action was taken in the plenitude of the power of the provincial legislature as defined by the Supreme Court of Canada, we perceive no reason for ascribing to that legislature an intention to override the provision of the treaty but rather see in that action an assumption on the part of the legislature that its course was not repugnant to the treaty, an inference which finds abundant support in the conclusion of the majority of the judges of the Supreme Court of Canada. Nor does it appear that either of the parties to the treaty has made to the other any representations as to a breach of obligation by reason of the making of the improvements or the imposition of tolls. We find no ground for rejecting the practical construction which the treaty has thus received.

Further, in 1909, for the purpose of settling all questions pending between the United States and the Dominion of Canada, "involving the rights, obli-

gations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier," the United States and Great Britain entered into a treaty concerning the boundary waters.<sup>17</sup> By Article I of this treaty the parties formulated their agreement "that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries equally."<sup>18</sup> The treaty expressly refers to uses and obstructions of boundary waters which had theretofore been permitted and sets up an International Joint Commission with jurisdiction to deal with future uses and obstructions, as stated. Article III of the treaty thus provides: "It is agreed that in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission to be known as the International Joint Commission."

We think it may fairly be said that the improvements here in question on the Pigeon River constituted structures and uses which had been permitted by the parties prior to the treaty of 1909 and were recognized by that treaty. It does not appear that any action has been taken by either Government or by the International Joint Commission inconsistent with this view.

We conclude that it was error to sustain the demurrer to the amended complaint. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

*It is so ordered.*

<sup>17</sup> 36 Stat. 2448, U. S. Treaties, Vol. 3, p. 2607.

<sup>18</sup> Article I of the Treaty of 1909 is as follows:

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

"It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof."

## ATTORNEY GENERAL OF THE UNITED STATES

OPINION UPON THE ACT TO PROHIBIT FINANCIAL TRANSACTIONS WITH ANY  
FOREIGN GOVERNMENT IN DEFAULT ON ITS OBLIGA-  
TIONS TO THE UNITED STATES

The Secretary of State has received an opinion upon various questions pertaining to the Act of April 13, 1934, entitled "An Act to prohibit financial transactions with any foreign government in default on its obligations to the United States," known as the Johnson Act. The Department of State concurs in the interpretation of the Act expressed in the Attorney General's opinion.\*

## DEPARTMENT OF JUSTICE

WASHINGTON

May 5, 1934

The Honorable

THE SECRETARY OF STATE.

*Sir:*

I have the honor to refer to your letter of April 17 requesting my opinion upon various questions under the Act of April 13, 1934, entitled "An Act to prohibit financial transactions with any foreign government in default on its obligations to the United States," which reads as follows:

That hereafter it shall be unlawful within the United States or any place subject to the jurisdiction of the United States for any person to purchase or sell the bonds, securities, or other obligations of, any foreign government or political subdivision thereof or any organization or association acting for or on behalf of a foreign government or political subdivision thereof, issued after the passage of this Act, or to make any loan to such foreign government, political subdivision, organization, or association, except a renewal or adjustment of existing indebtedness while such government, political subdivision, organization, or association, is in default in the payment of its obligations, or any part thereof, to the Government of the United States. Any person violating the provisions of this Act shall upon conviction thereof be fined not more than \$10,000 or imprisoned for not more than five years, or both.

SEC. 2. As used in this Act the term "person" includes individual, partnership, corporation, or association *other* than a public corporation created by or pursuant to special authorization of Congress, or a corporation in which the Government of the United States has or exercises a controlling interest through stock ownership or otherwise.

Your questions, in the order in which they are set forth, and my views thereon are stated below:

"(1). What Governments, political subdivisions, or associations are in default on their obligations to the United States?"

"Default" is a common word which conveys at once a known meaning, but as applied to particular situations, it is often a matter of uncertainty whether or not or when a "default" has occurred. Concerning it, Chief

\* Press release of the Department of State, May 5, 1934.

Justice Eyre declared in *Doe v. Dacre*, 1 B. & P. 250, 258; 126 Reprint 887, 891, "I do not know a larger or looser word than 'default';" but as to civil liability the following definitions are enlightening:

As used in such an instrument (a contract), it can mean only the nonperformance of a contract,—a failure upon the part of one of the contracting parties to do that which he had contracted to do. (Sixteen hundred Tons of Nitrate of Soda *v. McLeod*, 61 Fed. 849, 851.)

In one sense, any failure is a default, whether it arises from the omission to perform a contract, or from a neglect of duty. In many reported cases the omission to pay a debt or to perform a contract is spoken of as a default. (*Burrill v. Crossman*, 69 Fed. 749, 752.)

However, the word cannot safely be accepted as importing so inclusive a significance when it is used as a penal statute, as pointed out by the Supreme Court of Nebraska in *State v. Moores*, 52 Neb. 770, 787, upon consideration of a constitutional provision which rendered ineligible to public office "any person who is in *default* as collector and custodian of public money or property," which the court declared to be "penal in its nature."

*Lipman v. Equitable Life Assur. Soc. of the United States*, 58 F. (2d) 15, and *Hartsuff v. Hall*, 58 Neb. 417, each dealing with written instruments providing for payment at a stated time with grace, reached contrary conclusions upon consideration of the context and probable intention as to whether "default" occurred at the time specified for payment or at the end of the grace period, thereby indicating that no absolute or rigid meaning is to be assumed in a civil case, and *a fortiori* in a criminal case.

In view, therefore, of the flexibility of the term, and bearing in mind that a penal statute is to be strictly construed against the imputation of criminality to an act which is not *malum in se*, I think it is required that we seek carefully from authorized sources the probable intent of Congress. In connection therewith your letter indicates particular concern as to Great Britain and other countries which have made so-called token payments, and as to the Soviet Government which has not yet, as you informed me, recognized as binding upon it the obligations incurred by prior governments in Russia. I shall, therefore, indicate to the extent that I properly can, my views in these instances.

On November 7, 1933, the President issued the following statement:

For some weeks representatives of the British Government have been conferring with representatives of this Government on the subject of the British debt to this country growing out of the World War. . . .

It has, therefore, been concluded to adjourn the discussions until certain factors in the world situation—commercial and monetary—become more clarified. In the meantime, I have as Executive noted the representations of the British Government. I am also assured by that Government that it continues to acknowledge the debt without, of course, prejudicing its right again to present the matter of its readjustment, and that on December 15, 1933, it will give tangible expression

of this acknowledgment by the payment of seven and one half million dollars in United States currency.

In view of these representations, of the payment, and of the impossibility, at this time, of passing finally and justly upon the request for a readjustment of the debt, I have no personal hesitation in saying that *I shall not regard the British Government as in default.*

On the same day the Chancellor of the Exchequer addressed the House of Commons to the same effect, concluding with the President's statement that he would not regard the British Government as in default.

A statement of similar import had been made by the President in June, 1933, shortly before certain installments upon the debts were due. It is unnecessary to repeat here the statement then made or to treat further of later statements by the President and their acceptance in good faith, except to say that Great Britain and certain other countries made partial payments on installments due in June, 1933, and in December, 1933, with the expectation and belief that they would thereby avoid a default.

In his annual message to Congress delivered at a joint meeting of the two Houses on January 3, 1934, the President stated:

I expect to report to you later in regard to debts owed the Government and people of this country by the governments and peoples of other countries. Several nations, acknowledging the debt, have paid in small part; other nations have failed to pay. One nation—Finland—has paid the installments due this country in full. (*Cong. Rec.*, Vol. 78, p. 5.)

It does not appear, however, that any further report in regard to these debts was transmitted to Congress prior to the enactment of the statute.

I find no record of the expression of any views in the Senate upon the meaning of the word "default" when the bill was under consideration, but the matter was considered in the House, as indicated by the following excerpts from the *Congressional Record*:

Mr. BANKHEAD. Under this bill, what would be the status of governments like England, that made a so-called "token payment," but has defaulted in the main?

Mr. McREYNOLDS. The President of the United States, as I understand it, has held that they are not in default. (*Cong. Rec.*, Vol. 78, p. 6192.)

Mr. BRITTEN. Does the gentleman agree with the gentleman from New York (Mr. FISH) that those governments which have made a small token payment will not be held in default by our Government?

Mr. JOHNSON of Texas. I am not so sure about that. (*Cong. Rec.*, Vol. 78, p. 6194.)

Mr. JOHNSON of Texas. Yes; the language is broad and comprehensive, but the question of what constitutes a default is one that will have

to be determined by the terms of the original contracts supplemented by any subsequent agreements that may have been lawfully made. (*Cong. Rec.*, Vol. 78, p. 6195.)

Mr. KLOEB. Since that time we have beheld the spectacle of all these debtor countries, save one, either actually defaulting in the payments of the installments as they became due or making a so-called "token payment" in order to avoid the ugly word "default." (*Cong. Rec.*, Vol. 78, p. 6197.)

Mr. BRITTEN. Mr. Speaker, I am going to vote for this bill because I have, to my own satisfaction at least, concluded that any nation of Europe in default of any portion of its indebtedness, interest or principal, to us is included in the intention of the bill.

I realize that in the following statement I am disagreeing with the chairman of the committee and probably with the ranking member on this side, but on page 2, in speaking about the indebtedness it says, "While such government is in default in payment of its obligation or any part thereof." I fail to see why England with a surplus this year of \$160,000,000 in her treasury, or France, with countless millions of gold in her treasury, more gold in her treasury per capita than we have, and governments of that type should be excluded from the provisions of this bill, and France is not, I realize, just because they made some insignificant token payments on account of their vast obligation to us.

If the State Department were to exclude those nations from the provisions of this bill then Czechoslovakia, Great Britain, Greece, Italy, Latvia, Lithuania, and Rumania would be excluded because they have all made some small payment.

My contention is that the State Department should not act that way, nor has it the authority to presume that because an infinitesimal payment has been made on an indebtedness of billions it takes that nation out of one class and puts it into a preferred class. (*Cong. Rec.*, Vol. 78, pp. 6197-6198.)

Mr. McReynolds was in charge of the bill during its consideration by the House and, therefore, under the rules applied by the courts in considering such proceedings, his apparent view that Great Britain and other countries similarly situated were not to be deemed in default, is entitled to especial weight.

Moreover, the President, by signing the bill, participated equally with the Houses of Congress and his view as to the meaning of words employed in it is of great significance. I cannot assume that he believed Great Britain to be in default, within the meaning of the word as used in the bill, in view of his express statements on the subject; and from such information as I now have before me it would appear that Czechoslovakia, Italy, Latvia and Lithuania fall in the same category with Great Britain. I conclude, therefore, that these five countries are not, at the present time, in default under the terms of the Act in question.

Beyond this a specific answer as to what governments, political sub-

divisions, organizations or associations are in default on their obligations to the United States would seem to require a survey of data not immediately available to this office, but in general it may be said, in the words of the statute, that a "foreign government, political subdivision, organization or association is in default" if it has failed "in the payment of its obligations, or any part thereof, to the Government of the United States," according to its promise or undertaking to pay a fixed amount at a definite time, unless such default has been postponed or waived in some competent manner or by a transaction having that effect in law or good morals. Should any authoritative statement, in harmony with this opinion, be issued in the form of an administrative declaration that named countries are or are not in default, I should be inclined to follow it in so far as the Department of Justice is charged with the responsibility of instituting prosecutions in cases of violation, thereby removing misapprehension and uncertainty to those who desire to avoid conflict with the statutory interdiction; and should the question come before the courts it is reasonable to believe that they would honor any such administrative determination.

With regard to the status, under the Act, of a political subdivision of a defaulting country when the subdivision itself is not in default, attention is called to the fact that while explaining the bill in the House of Representatives, Mr. McReynolds stated that in such a case the political subdivision, such as a city in a defaulting country, would not come within the inhibitions of the bill if the city itself were not in default (*Cong. Rec.*, Vol. 78, p. 6200). I approve this view, not only because of the presumption arising from Mr. McReynolds' explanation, but because a reasonable interpretation of the statute itself supports the conclusion that the default of a foreign government would not be imputed to a political subdivision thereof, *e.g.*, a municipality, so as to prohibit the purchase or sale of bonds or securities of the latter, if the municipality is not itself in default.

It has also been asked whether or not Canada, a member of the commonwealth of nations which compose the British Empire, is to be regarded as a political subdivision of Great Britain. The question should properly be answered in the negative, and this conclusion was suggested in Congress (*Cong. Rec.*, Vol. 78, p. 6195), but it appears to be immaterial in view of my conclusion above stated concerning the intention of Congress as applied to the obligations of political subdivisions. Canada, I believe, is not in default.

"(2) To what types of transactions does the Act apply?"

The Committee Reports (S. Rept. 20 and House Rept. 974, 73d Cong.) recite that the bill was introduced following an investigation by the Senate Committee on Finance and the revelation therein that "billions of dollars of securities . . . offered for sale to the American people" were overdue and unpaid; that some of these "foreign bonds and obligations . . . were sold by the American financiers to make outrageously high profits"; and

stated a purpose "to prevent a recurrence of the practices which were shown by the investigation to be little less than a fraud upon the American people . . . to curb the rapacity of those engaged in the sale of foreign obligations . . ."

This, I think, is indicative of a purpose to deal with such "bonds" and "securities" and with "other obligations" of like nature, observing the rule of *ejusdem generis*—that is, obligations such as those which had been sold to the American public to raise money for the use of the foreign governments issuing them—not contemplating foreign currency, postal money orders, drafts, checks and other ordinary aids to banking and commercial transactions, which are "obligations" in a broad sense but not in the sense intended. It was obviously not the purpose of the Congress to discontinue all commercial relations with the defaulting countries.

"(3) What constitutes a renewal of an existing credit?"

Your Legal Adviser has concluded, in the memorandum transmitted with your letter of April 23d, that:

It would seem that any instrument which would be issued for the purpose of replacing the evidence of any existing indebtedness would constitute a renewal or an adjustment of an existing indebtedness. If new bonds were issued to replace old ones, it would seem that such a transaction would be permissible. Any instrument given in satisfaction or extension of an existing indebtedness would, it is believed, come within this exception.

In general, I approve this statement, but obviously it will be a question of fact in each case whether or not what is done amounts in good faith to the mere "renewal . . . of existing indebtedness."

"(4) Does the Act apply to acceptances or time drafts?"

This question appears to be sufficiently answered by the comments under Question No. 2, *supra*. It appears proper to add, however, that such transactions must be conducted in good faith, in order to be within the law, and not as mere subterfuges to circumvent its purpose.

"(5) Is the present Soviet Government, as the successor to prior governments of Russia, to be regarded as in default, in view of the fact that no payment has been made on the bonds issued to the Government of the United States by the Provisional Government, on account of loans made to that Government by the United States during the period of the war, the Provisional Government having been the immediate predecessor of the Soviet Government?"

The proceedings in the House of Representatives indicate acceptance of the view that our Government regards the Soviet Government as responsible for the obligations incurred by prior Russian governments. (*Cong. Rec.*, Vol. 78, p. 6192.) The position of our Government in this respect accords with accepted principles of international law, as illustrated by the following authorities:

Moore, *Int. Law Digest*, v. 1, sec. 96, quoting Secretary of State Adams (August 10, 1818):

No principle of international law can be more clearly established than this: That the *rights* and the *obligations* of a nation in regard to other States are independent of its internal revolutions of government. It extends even to the case of conquest. The conquerer who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty.

Halleck, *Int. Law* (3d ed.), v. 1, p. 90:

Public debts, whether due to or from the revolutionized State, are neither cancelled nor affected by any change in the constitution or internal government of a State.

The same rule is stated, in substance, in Kent's *Commentaries* (12th ed.), v. 1, p. 26, and in an opinion of Attorney General Griggs, 22 Op. A. G. 583, 584. In connection with, and in support of, these statements the authors cite 1 Whart. *Int. Law Dig.*, sec. 5; Hall, *Int. Law* (4th ed.), pp. 104, 105; Rivier, *Principes du Droit des Gens*, I, pp. 70-72; United States v. MacRae, L. R. 8 Eq., 69; Vattel, *Droit des Gens*, liv. II, ch. XII, §§ 183-197; Grotius, *De Jur. Bel.*, lib. II, cap. II § 8.

This view, in fact, was stated in Congress (*Cong. Rec.*, Vol. 78, p. 6192) to have suggested the insertion of the provision in Sec. 2 of the statute excluding from its operation public corporations controlled by the United States, which are permitted to engage in the transactions prohibited to individuals and private corporations, if administratively determined to be desirable. I, therefore, regard the Soviet Government as in default, within the contemplation of the statute.

"(6) However the last question may be answered, can the Soviet Government be considered in default to the Government of the United States pending negotiations that are being had with a view to arriving at the amount of the indebtedness due from the Soviet Government to the Government of the United States?"

Bearing in mind what I have just stated in response to your fifth question, I am aware of no principle of law under which a previously existing default is waived or overcome because of the mere pendency of negotiations "with a view to arriving at the amount of the indebtedness due," assuming that there is any uncertainty in this regard, although, of course, the matter might be affected by the outcome of any such negotiations.

"(7) Would the issue and sale in the United States of 'scrip' or funding bonds in part payment of outstanding obligations be in violation of the Act?"

This question appears to present only a detail of the matter treated generally under Question No. 3, and the same answer is applicable. In other

words, such "scrip" or "funding bonds" are authorized if issued in the *bona fide* "renewal or adjustment of existing indebtedness."

It is made unlawful, as I have said, "to purchase or sell the bonds, securities, or other (similar) obligations of any foreign government . . . issued after the passage of this Act, or to make any loan to such foreign government . . . except a renewal or adjustment of existing indebtedness." The word "renewal" needs no definition by me—it is frequently used and commonly understood in banking, business and commercial transactions—and the word "adjustment," relating to accounts or claims, has been used in our statutes since the formation of the Government. (See the Act of September 2, 1789, 1 Stat. 65, and the Act of March 3, 1817, 3 Stat. 366.) It is used, I think, in the sense of compromising or determining how much is to be paid, when and where, upon what terms and the like. Thus an adjustment of an existing indebtedness within the meaning of the Act is any lawful arrangement entered into in good faith between the debtor and the creditor which comprises or determines the amount to be paid by the debtor to the creditor and it may include other details of composition or settlement.

Respectfully,

HOMER CUMMINGS  
*Attorney General*

## BOOK REVIEWS AND NOTES \*

*Derecho Internacional Publico.* By Antonio S. de Bustamante y Sirven. Habana: Carasa y Cia. Vol. I, 1933, pp. 574; Vol. II, 1934, pp. 534. Index.

By having deferred the writing of his great work on Public International Law until the present time, Dr. de Bustamante is able to put into its pages the results of his many years of experience as a teacher and counsellor in international law, as well as his continuous service on the bench of the World Court since the day it was established. The two volumes now finished show a distinct departure from the traditional treatment which so often has presented public international law as a law of disputed validity, divided into two major parts, peace and war, with war getting the weight of attention, and still another part on the same thing, thrown in for good measure, under the guise of the innocent-looking title of "Neutrality." There is no Austinian bickering over sovereignty in this work. Dr. de Bustamante takes it for granted that international public law has come of age, and that its real importance lies in its guidance and regulation of those many and various activities of nations and peoples which never come to issue, as well as those which do. The author analogizes the subject to national or municipal law and very logically divides it into Constitutional, Administrative, Civil, Penal, and Procedural Public International Law.

Dr. de Bustamante is the first writer to include the League of Nations and the Pan American Union in the definition of public international law. This he gives as:

the body of principles which regulate the external rights and duties and relations of juridical persons who form a part of the international community, among themselves and with the League of Nations and the Pan American Union, as well as the customary rules of internal or external protection to individuals which have been established by international accord.

Under the heading of Constitutional Public International Law the author follows the classical conception of states as international personalities, and traces their birth, life and death in the recurrent history of nations. The conditions of applying the restrictive requisites of recognition are those laid down by the Pan American Commission of Jurists at Rio de Janeiro in 1925,—a legalized method of birth control which the United States and other members of the Pan American Union have several times since signally failed to utilize. The rights and duties of states are phrased in the language approved by the

\* The JOURNAL assumes no responsibility for the views expressed in book reviews or notes.—ED.

American Institute of International Law at its meeting in Washington in 1916, which quotes for authority the Declaration of Independence of the United States. Among the duties which the author classifies as fundamental is the "duty of non-intervention" (by force). He finds himself unable to accept the claim of right to "intervene by request,"—a doctrine which was at one time advanced by Secretary of State Hughes under the name of "interposition." He gives as his reason the difficulty of adjudging the "spontaneity" with which the apparent request for intervention is made on the part of the state on whose territory intervention takes place. Volume I closes with consideration of the organs and methods of official representation through which a state participates in the affairs of the international community, and the legislative, executive, and judicial phases of Constitutional Public International Law.

Volume II is devoted entirely to Administrative Public International Law. In dealing with its objects of protection, the author reverses the usual order of consideration and gives the objects of humanitarian protection first place and property last place in his chapters on that subject. In the chapters which follow on commercial relations, agriculture and labor, one can see the working of the process of the growth and development of international law through international organization. Included as a part of this process is the slow gain of individual nations in overcoming nationalism at home before they are able to make good their international commitments. The second volume closes with the administrative regulations of the League of Nations, the International Labor Office, the Pan American Union and the World Court, and leaves the completion of the administrative branch and future chapters on the Civil, Penal and Procedural branches of Public International Law for forthcoming volumes.

The leading writers of different countries receive a generous forum in these two volumes, and their diverse opinions are skillfully summarized and followed by the author's own conclusions, which are always stated with fairness and great clarity. Dr. de Bustamante carries into the two volumes just finished the simplicity, grace, charm and strength which have always characterized his writings in the Spanish language, as well as his constant sympathetic consideration of human values as the end which international law should be made to serve. It is to be hoped Dr. de Bustamante's work will receive an early translation into the principal languages of the different nations.

H. MILTON COLVIN

*Corso di Diritto Internazionale.* By Arrigo Cavaglieri. 3rd ed. Naples: Rondinella Alfredo, 1934. pp. viii, 582.

In this third edition, the second having been exhausted within two years after its issuance, all the material is revised and brought up to date. The author appears in its production to have more largely developed certain topics, such as the recognition of new states, change of government, the effect of

treaties and their interpretation. Particular attention is also given to the present juridical condition of aeronautics.

The general viewpoint of the author favors the positive side of international law, and from this standpoint he has succeeded in producing a book of value. Real progress, however, in international law, in the opinion of this reviewer, cannot be made without detailed and thorough re-examination of the foundations of international law and a determination of their soundness, a course of study to which the positivists are by no means addicted. It is interesting to note that the author spends scarcely any time discussing the so-called laws of war. This is not because of the fact that the expression "laws of war" is in itself a contradiction, but because he finds they have been so far disregarded that today no one can be sure of their having any existence, save as to some features of the Geneva treaties relative to the care of wounded and treatment of prisoners. Of course, conventions between nations have had little effect in either respect, as we must attribute any progress we have made to growth in civilization, of which the conventions have simply afforded a minor proof.

Among other matters considered by the author in the introduction are definitions of international law and its historical formation; criteria distinguishing international and municipal law; foundation of the obligatory force of the first; sources as found in custom, treaty, and general principles of law as observed by civilized nations; application and interpretation. In the first chapter the author discusses the subjects of international law, including the formation of the state, its recognition, nature, judicial character, etc.; juridical effects of recognition; territorial and constitutional changes of states and their extinction. In the second chapter he discusses the territorial activity of states under international law, including dominion over land, rivers, the sea, and the air, as well as obligations to foreigners. In the third chapter the author considers extraterritorial activities of the state, including its expansion. In the fourth chapter are taken up the organs of international relations, including the head of the state, ministers of foreign affairs, diplomatic and consular agents with their juridical position; also international organizations of various kinds. In the fifth chapter are discussed, among other things, the making and effects of treaties as between parties and with respect to third states, including provisions in favor of or against them; also, methods of extinguishing treaties and the effect of war upon them, giving particular attention to the clause *rebus sic standibus*. Illegal international acts are also examined, including the violation of fundamental principle, responsibility, including that for the acts of statutory authority, irrelevancy of the limits of internal competency, denial of justice, elements of wrong, and generally the claims of foreign states for damages suffered by their citizens. The chapter also discusses the matter of reparation for illegal acts and their character and forms, with the coercive sanction, and also the theory of Drago.

The sixth chapter considers the sanctions of international law, including non-warlike means of coercion such as intervention and reprisals. (It must

be confessed at this point that this reviewer finds some difficulty in regarding reprisals, considered as physical acts, at all consistent with the spirit of modern civilization, and would be disposed to regard any discussion of them as antiquated rather than relating to the positive law of today.) The chapter closes with a discussion of good offices, mediation, conciliation, arbitration, commissions of inquiry and their formation, including also treaties of arbitration, the Permanent Court of Arbitration of The Hague, the Locarno Pacts, the Kellogg Pact, and the General Act of Geneva, closing with the Four-Power Pact signed at Rome in 1933.

JACKSON H. RALSTON

*International Economic Relations.* Report of the Commission of Inquiry into National Policy in International Economic Relations. Minneapolis: University of Minnesota Press. London: Humphrey Milford, 1934. pp. ix, 397.

The Social Science Research Council, an autonomous body representing seven national professional societies in the field of social science, proposed in the autumn of 1933 to initiate an inquiry into the elements which should constitute a national policy in international economic relations. After obtaining the approval of the plan by President Roosevelt, the Research Council appointed a commission with Robert M. Hutchins, President of the University of Chicago, as its chairman. The present volume embodies the commission's recommendations, the reasons therefor, the report of the director of research, Alvin H. Hansen, and selected memoranda consisting of statements made before the commission and reports submitted by research assistants. The recommendations are, of course, principally of an economic nature; and yet many, if not all, of the recommendations are closely connected with both national and international politics.

The report emphasizes that international economic relations cannot be greatly improved until the distrust and tension now prevailing in the world are relieved. Among the specific policies recommended are the continued participation of the United States in the Disarmament Conference, coöperation with the League of Nations in such of its activities as cannot involve us in European conflicts, and adherence to the World Court. The anti-imperialistic policies exemplified by the grant of Philippine independence, the withdrawal from Haiti and the repeal of the Platt Amendment are also strongly approved. Measures which will be more difficult to effectuate and which the commission likewise supports are the placing of immigration from the Far East on a non-discriminatory basis, the repeal of the Johnson Act forbidding loans to countries in default, and the immediate settlement of the war debts. One of the recommendations will perhaps cause a sickly smile to play across the features of the average American private investor. It is that in which the government is urged to "make it clear that future investments abroad are at the investor's risk." American investors are by this time to their sorrow fully convinced of that fact. If the commission really believes that "a certain amount

of sound judicious lending by Americans in these critical times" might be beneficial (p. 25), it certainly does not help matters to ask the government to point out "the possibilities of friction involved in even the customary diplomatic representations as to foreign investments" (Recommendation II, 7). The commission seems in effect to say, as does Rosaline in *Love's Labour's Lost* (v, 2): "and your task shall be, with all the fierce endeavor of your wit, to enforce the pained impotent to smile."

The report is of very great importance and will undoubtedly be influential in shaping our national policies in the field which it assumes to cover.

ARTHUR K. KUHN

*The Law of Citizenship in the United States.* By Luella Gettys. Chicago: University of Chicago Press, 1934. pp. xxii, 221. Index. \$3.00.

This volume affords, for the first time since 1907, an accessible and unified treatment of a subject which has become increasingly difficult and confused. The thirty-two acts of Congress, the various naturalization conventions and treaties, and the Federal Constitution, comprise a *corpus* of citizenship law which is generally conceded to be indefinite and unsatisfactory. The complexity thus presented is clarified by the author's concise summaries of historical background, and by brief digests of judicial decisions. The whole gains cohesion from the correlation of arbitration commission findings, the opinions of the Attorneys-General, and the rules of the Departments of State and Labor. The style is without technical or academic obscurity. The work presents no difficulties to the non-legal reader, yet its complete documentation is invaluable to the research scholar.

The international problems presented by our statutes are carefully noted. In a thoughtful final chapter are summarized the internal problems and international phases of citizenship and naturalization which urgently require attention before those divisions of public law can attain that definiteness and certainty which the increasingly stringent immigration and passport laws of the United States render necessary for the preservation of individual rights and the uniform enforcement of law.

The authority of Miss Gettys' scholarly work is measurably enforced by an extensive bibliography and table of cases. The publication has been made possible in large part by the Social Science Research Council. The author, and her sponsors, have accomplished a valuable contribution to a subject which has long required the comprehensive treatment that is now made available.

ERNEST J. HOVER

*La Convention de Varsovie (Pour l'unification de certaines règles relatives au transport aérien international, 12 octobre, 1929).* By D. Goedhuis. The Hague: Martinus Nijhoff, 1933. pp. viii, 295. Index. Gld. 6.

This is a detailed inquiry, a complete and competent study of the Warsaw Convention of 1929 for the unification of certain rules regarding air transpor-

tation. The study is built up on a thorough investigation of the corresponding literature, the different municipal laws, and the history of international efforts in this domain.

The author begins with an analysis of the general and particular rules of law concerning the responsibility of air carriers, rules which have been in force in Holland, France, Germany, and Great Britain in the period from 1919 to 1933; he gives an exposé of the statutes, the underlying theories, and a survey of the most important court decisions. He then treats in detail the history of the Warsaw Convention and gives a complete commentary on this convention, a convention which is limited in its application, and as regards its contents, primarily restricted to the civil responsibility of air carriers for the transportation of passengers and cargoes. Air carriers are, according to the convention, under less rigorous rules than other carriers: there is the liberatory clause of Article 20, the clause of Article 21, concerning "contributory negligence"; even, in other cases, the responsibility of the air carrier is unlimited only if there has been fraud on the part of the air carrier or his employees; as a general rule, his responsibility is limited to a maximum sum (Article 21); but—very much in contradistinction to the law in force in France, Germany, and Great Britain, 1919–1933—a clause modifying or voiding the rules of the convention on liability is invalid (Article 23).

The attitude of the author toward the convention is in many respects critical. But he points out that this convention was faced with the difficult task of reaching a compromise between the very different juridical conceptions of the Continental and the Anglo-Saxon laws. And even if the convention cannot be regarded as completely satisfactory, it must be borne in mind that it constitutes the first step toward the realization of the absolutely necessary unification of the rules of private law concerning air transportation.

JOSEF L. KUNZ

*The United States and Cuba.* By Harry F. Guggenheim. New York: Macmillan Co., 1934. pp. xx, 268. Index. \$2.50.

Any United States ambassador to Cuba, however much or little he may accomplish, earns his salary many times over. He may be sure of adding to his "reputation" a volume of abuse in Cuba which will have its repercussions in the United States. He may also be fairly certain that no one whose voice can be heard will be found to praise him. What then of a man who does not need the money attached to the post? The author of the book here reviewed, ambassador to Cuba from 1929 to 1933, is a multimillionaire, one who "retired from business in 1923" at the age of 33. Previously his connection with the immense mining investments of the Guggenheim family had taken him many times to Hispanic America, with incidental trips to Cuba, in which country, however, he had no financial interests. Between 1923 and 1929, it would seem, he was indulging himself in his fancy for aeronautics and leading the life of a New York clubman. One wonders if Mr. Guggenheim knew what

kind of a hornet's nest he was getting into, in accepting the ambassadorship to Cuba, although his general knowledge of Hispanic America might have given him some clue.

I have in my possession reams of literature denouncing Mr. Guggenheim—some of it from men of whose moral, intellectual, and political honesty I do not entertain the least doubt—and not a page referring to the one-time ambassador to Cuba with approval. So I expected this volume to present Mr. Guggenheim's side of the controversy. I was distinctly disappointed, therefore, when I read the "Foreword," in which the author announced himself as a historian of United States relations, except that he would "not attempt to tell the story of the four years 1929-1933." I had no reason to believe that Mr. Guggenheim would prove to be a noteworthy historian, except for those very four years which he proposed to omit. And, indeed, for the pre-1929 story the book would hardly be called outstanding, although it does present some new material, especially along lines of the history of relations directly concerned with the Permanent Treaty between Cuba and the United States. This may be considered the special thesis of the author, who advocated a revision of the treaty which would eliminate the features which have been the occasion of considerable controversy. However, such action has already been undertaken by the Roosevelt administration. It developed that Mr. Guggenheim had a lot to say about his own activities in Cuba from 1929 to 1933, and this, together with a number of acute observations on the character of Cuban life, especially in the realm of politics, give his book its principal value.

The following are some brief illustrations of these features—only a few out of many. "A complete revision of the tax laws was among the reforms that I urged upon President Machado." "I suggested to President Machado that the Crowder electoral code of 1919 . . . be restored." "I urged upon President Machado . . . that he . . . enact drastic and liberal political reforms." "I prevented the entry of American warships into Havana harbor." "I interceded personally time and again to request a fair trial for political prisoners." That he caught the spirit of Cuban life is evidenced by many of his comments. In speaking of the proclivity of the Hispanic American student to take a prominent share in political activities, rather than employ "an outlet for his surplus energies . . . in athletics and other highly organized student activities," he quotes a Cuban as wondering who would attend the University when it reopened, "as the students are all busy governing." He presents instances in his own experience of the Cuban propensity to take the gambler's chance for all or nothing rather than compromise. He calls attention to the fact that there "would be few verdicts of 'guilty' by juries in Cuba." Remarking upon recurring periods of government censorship and freedom of the press, he brings out the extreme indulgence in distortions of news and vitriolic personal attacks in the latter instance "of a kind rare in our own country." He speaks of the *bola*, "a rumor in the shape of a ball rolling around the city for every-

body's misinformation," and recites instances when he himself was the victim. He brings out a fact, too little understood in the United States, that there is a vast difference between the public professions of a Cuban (and one might broaden the term to Hispanic American) politician and what he is willing to say in private; for example, it is bad politics to speak well of the United States, but many who denounce this country will sometimes go the length, in private, of seeking a United States intervention as against the party in power.

If Mr. Guggenheim has really had much to say about what he did in Cuba, his detractors will undoubtedly not only attempt to refute him, but also stress the omissions in his volume. The reviewer is in no position to judge between them. He sympathizes with any man so unfortunate as to be United States ambassador to Cuba. On the other hand, he sympathizes with the Cuban people, whose sad plight is in great measure due to the Government of the United States, not for the aggressive imperialism with which it is charged, but for what may be called its "powerful negligences" with respect to Cuban affairs. The ambassador, naturally, has to bear the brunt of the accumulated Cuban impatience. Quite apart from what Mr. Guggenheim may or may not have done in Cuba—and I frankly imagine he tried to do his best in an impossible situation—I find his book both readable and useful.

CHARLES E. CHAPMAN

*Documentary Textbook on International Relations.* By John Eugene Harley. Los Angeles: Suttonhouse, 1934. pp. xxviii, 848. Index. \$6.00.

In an enthusiastic introduction to this volume, Mr. Charles E. Martin characterizes it as "a profound contribution to an ordered world." It is a useful collection of documents for students, based upon a "belief that students gain more realistic and lasting impressions by studying at first hand reliable documents and materials than by other methods." Such a collection involves the two processes of selection and presentation. In Part I on International Organization and Coöperation, the editor allocates 107 pages to the League of Nations, 16 pages to the League and the Monroe Doctrine, 86 pages to the Permanent Court of International Justice, 26 pages to the International Labor Organization, 22 pages to the Pan American Union, and 28 pages to other official organizations. In Part II on Pacific Settlement of Disputes, 222 pages are given to a single chapter on selected representative treaties and documents. In Part III, 80 pages are given to Renunciation of War. Part IV on Limitation and Reduction of Armaments claims disproportionately more than 200 pages. The omission of some of the documents, such as drafts of the Statute of the Permanent Court of International Justice, would not have impaired the volume's usefulness. The Argentine-Chilean Treaty of 1902 (p. 336) might have been replaced by a typical arbitration treaty of the period. A bibliography of almost 40 pages contains some items of passing significance. On the whole, the job of selection is well done.

Presentation is quite as important as selection. Most of the documents are

reproduced from official sources, though not always the best sources. In some cases essential information is lacking; e.g., the text of the Four-Power Pact of June 7, 1933, is reproduced without any indication that it has not been and is not likely to be brought into force. A few instances of classification seem odd, as when one reads (p. 321) of the Lytton Commission sent to the Far East in 1932 in a section mainly devoted to commissions of enquiry under the Hague Conventions for Pacific Settlement. The volume loses some of its effectiveness in consequence of the lack of differentiation of type. It fills a real need, however, and it is a departure which both teachers and students should welcome.

MANLEY O. HUDSON

*The Permanent Court of International Justice.* By Manley O. Hudson. New York: Macmillan Co., 1934. pp. xxviii, 731. Index. \$5.00.

Professor Hudson is one of the American international lawyers who has been most assiduous in his study of the work of the Permanent Court, a study which has already borne much fruit in the printed word. No one who knows him and is familiar with his writings can question that anything he says upon the court will be based "upon a continuous study of the documents, upon numerous contacts with persons interested in the Court, and upon an unflagging interest in its activities" [p. vii].

This book is of a different nature from his other publications. It is "a systematic and detailed study of the Court's entire procedure" [p. viii], by which the author understands not only procedure as it is usually conceived, but also the organization of the court itself, of its agencies, and of its jurisdiction. The author realizes the importance of the history of the terms used in a legal document like the Statute of the Court, so he has traced the meaning of the sections of the Statute and other international documents and the changes which a particular expression has undergone in the course of its formulation, and before it was incorporated in the final draft. An interesting instance of the application of this method is the meaning of the expression "legal disputes" in Article 36 of the Statute [pp. 390-1].

The fruit of Professor Hudson's study of the stages in the development of the sections of the treaty law relating to the court, with its ample citations, will be in itself a very useful tool, both to the practitioner before the court and the student of the court, not only in what he will find in the book, but in the rich collection of references to documents and cases.

Professor Hudson has made good use of his close study of the cases decided by the court. An excellent instance of the combined use of history, document, and jurisprudence is in his chapter on "Obligatory Jurisdiction under Article 36" [Ch. 20]. He examines the "somewhat obscure" history of the Optional Clause, then summarizes the forms used by the states in their declarations adopting the Optional Clause, which he follows by the interpretations by the Assembly of the terms of the article, and ends his chapter with

a critical digest of the action in the court on the four applications made under the clause.

In view of the probability that the question of American accession to the Court Statute will come up in the Senate, the author's analysis of the Protocol for the accession of the United States is of particular interest [p. 219ff]. In view of the provision of the Protocol that the objection of the United States with regard to requesting an advisory opinion of the court touching a dispute or question in which the United States has or claims an interest, shall have the same effect as a vote given in the Council or Assembly [p. 225], the author's discussion as to whether the vote in Council or Assembly must be unanimous [p. 437], and his conclusion that "it is impossible to give a definite answer to the question," is interesting.

The author has appended to his book the various instruments relating to the constitution of the court, including the declarations accepting the Optional Clause, and the 1931 Rules. Part I of the book deals with the precursors of the Permanent Court of International Justice, including the Permanent Court of Arbitration, International Commissions of Inquiry, the Central American Court of Justice, and chapters also on the International Prize Court and the Court of Arbitral Justice proposed at the Hague Conference of 1907.

JOSEPH P. CHAMBERLAIN

*A History of American Foreign Policy.* By John H. Latané. Revised and enlarged by David W. Wainhouse. Garden City, N. Y.: Doubleday, Doran & Co., 1934. pp. xvi, 862. Index. \$4.00.

This well-known history of American foreign policies has been highly regarded and widely used since its first appearance in 1927. The publication of a revised edition prepared by Professor Latané was prevented by his untimely death. This task, however, has been performed by the revisor, who has brought the history down to about January 1, 1934. The major portion of the former volume remains as it was, with a few minor revisions. Six entirely new chapters have been added dealing with such topics as Disarmament, the World Court, the Kellogg Pact, the Sino-Japanese conflict, War Debts, and the Breakdown of Isolation. As in the first edition, there are no chapter bibliographies, but there is a useful general note on sources of information. To the revised edition several maps have been added, showing American territorial expansion on the North American continent and the extension of our interests into the Caribbean and the Pacific areas. There is also a map showing the members of the League of Nations and the signatories of the Kellogg Pact.

Professor Latané's thorough grasp of the subject, combined with an extraordinarily felicitous style, set a standard so high as to make the revisor's task an unusually difficult one. Although the latter has not quite reached this standard, he has performed his task in a competent and workmanlike manner. He has contented himself, for the most part, with a straightforward

and unvarnished statement of the facts, without going to any great extent into an interpretation or critical analysis of them.

With most of the revisor's statements, the reviewer fully agrees. In discussing the Kellogg Pact, however, the revisor declares that "to renounce war as an instrument of national policy would be to bar any war but that waged in defense of one's territory" (p. 754). Such renunciation, however, would not prevent resort to war as an instrument of international policy where invasion of the territory of all parties to the conflict would not necessarily be involved. The title of the last chapter, "The Breakdown of Isolation," seems hardly accurate if it implies that isolation really existed just prior to recent developments. The revisor further states that "since the statute (of the World Court) is an international convention, it could not be changed without the consent of any of its signatories" (p. 731). In this statement the word "any" should be changed to "all."

On the whole, however, the revised volume will be found to be excellent as a basis for student discussion in college classes, and also to be extremely useful to the general reader desiring a scholarly but readable survey of the whole history of our foreign policies.

JOHN M. MATHEWS

*Les Traités Internationaux devant les Juridictions Nationales.* By Louis de Naurois. Paris: Recueil Sirey, 1934. pp. viii, 245. Index. Fr. 35.

In his analysis of the legal status in internal law of international treaties, Louis de Naurois' primary interest is in ascertaining whether French courts apply the substantive rules found in international treaties as they would apply municipal legislative regulations (monistic point of view), or whether they distinguish between the two sources of law (dualistic point of view). He expresses the belief that French jurisprudence is indecisive and that the actual legal status of treaties may be determined only from a critical examination, *au fond*, of the dualistic and monistic philosophies of law.

The dualistic concepts of Jellinek, Triepel, and Anzilotti are clearly and incisively rejected. Their ideas of the nature of the State are criticized as artificial and unreal; the State, as an aggregation of social groups, cannot be personified to the extent of having a "will" of its own. Law is dependent, not upon the external forms of its creation and sanction, but upon its content, which is governed by the standards of justice prevailing among the social groups within the State. These standards are expressed alike in municipal legislation and in international treaties. Hence, all law is a unity, and distinctions cannot be made between internal and international law on the basis of the different forms of their expression. Objective rules of substantive law found in international treaties of a private law character will therefore be applied by national courts in suitable cases without undergoing an artificial process of "transformation." Exceptions to this principle are admitted where the treaty is in the nature of a contractual arrangement, involving mere obligations of state to state.

Because of his departure from the orthodox theories of international law, the conclusions of the author will not meet with universal approval. Yet, in spite of its misleading title, this treatise is a stimulating and refreshing addition to the growing literature of international jurisprudence.

H. ARTHUR STEINER

*Kommentar der Konvention über das Memelgebiet.* By Jacob Robinson. Kaunas: Verlag Spaudos Fondas, 1934. 2 vols. pp. xvi, 911; xvi, 742. Index.

This massive commentary on the basic convention and statute of May 8, 1924, governing the Memel territory, is the work of one of the most outstanding Lithuanian jurists and publicists, whose work on *Das Minderitätenproblem und seine Literatur* (see this JOURNAL, Vol. 22 (1928), p. 937) has received widespread recognition. The two volumes are intended to blaze a trail through the widely ramified literature and diversified subject matter of the rather complex fundamental law of the Memel territory. The author's endeavor is to evaluate the different juristic theories arrived at on the basis of constitutional and international law doctrines and ten years' experience in the working of the convention, as well as through comparison with the legal status of other autonomously governed areas.

Volume I is devoted to an elaborate, methodical exposition of the diverse parts of the convention, beginning with its pre-history (excellently done), the citation and appraisal of the relevant literature and the general theories of interpretation of the convention itself. The text of the convention and its annexes is followed by a detailed commentary on the convention, *strictu sensu* (pp. 85-244). Appendix I, the commentary on the statute, forms the core of the book (pp. 245-811). Two additional appendices deal with Memel harbor (pp. 812-850) and with transit (pp. 851-860). An exhaustive annex on sources and literature in regard to the law of autonomy, and an index complete the volume. For persons interested in the theory of international law and relations, the author's illuminating discussion of autonomy as a legal status (pp. 244-319), together with his compilation of virtually all the existing literature on the subject, should prove of genuine importance and value. Nothing known to the reviewer approaches it in comprehensiveness and analytical acuity.

Volume II is essentially a collection of relevant texts, from the pertinent articles of the Treaty of Versailles, through the transfer of authority in the Memel territory to the Allied and Associated Powers, to the final allocation of the area to Lithuania. A large part of the volume is devoted to the documentary genesis of the convention, with a most valuable exposition of its articles, annexes and the declaration of autonomy. These are compared with the individual projects and counter-projects from which the convention as a whole took final shape. Many subsidiary documents—treaties, declarations, laws and administrative ordinances (not all of them at

first sight obviously relevant), as well as reports of the League of Nations and decisions of the Permanent Court of International Justice referring to Memel—appear as annexes. Naturally, minority guarantee provisions bulk rather large. Finally, there is a valuable detailed commentary on the Harbor Ordinances and the Barcelona Statute, together with enforcement ordinances.

The concluding section of Volume II, which will be of undoubted significance to students of comparative legislation, consists in the bringing together in juxtaposition to the Memel Statute of the authentic texts of statutes conferring autonomy on Sub-Carpathian Ruthenia, the Aaland Islands, the voivodship of Silesia, and Catalonia. All told, the volumes provide an exceedingly useful legal treatment of a very complex subject-matter and afford objective bases of comparison with other autonomous régimes. They will long be regarded as the basic and authoritative treatise on the Memel question.

MALBONE W. GRAHAM

*The United States of Europe and Other Papers.* By the author of *Recovery* [Sir Arthur Salter]. New York: Reynal & Hitchcock, 1933. pp. 303. Index. \$2.50.

Admirers of Sir Arthur Salter will be interested in this collection of a number of his private papers which present his views upon important international problems arising during the decade following the World War. It was, the author states, his habit to commit to writing his reflections on the wider aspects of questions presented for current decision and action; and they represent a sort of record in writing of the kind of arguments which an official would prepare for official and unofficial discussion with his colleagues. Part I deals with "The United States of Europe" and contains many thoughtful observations upon the fundamental principles underlying the League of Nations and the attempt to create within the League, or independently of it, regional leagues dealing with the problems peculiar to a small group of states. The very strong position taken by the author that "for its primary task—the prevention of wars, especially great wars—the League must be universal" is ably argued and shows the far-sighted judgment of the author and his ability to uphold principle as against temporary expediency. His analysis of the conditions under which a United States of Europe might be created shows the interplay of political and economic forces and offers many suggestions of value for the present situation in Europe.

Part II deals with "The Weapons of the League" and is devoted to the conditions under which the "economic sanctions" of the League might be successfully applied and to the possibilities of common action against an aggressor under Articles 11 and 16 of the Covenant. Particularly acute, if restrained, are the observations of the author upon President Hoover's proposal for the immunity of food ships and upon other aspects of the "Freedom of the Seas" which involve the relation of the United States to the League and the validity

of the "old" laws of war and of neutrality. While it could be wished that the author of *Recovery* might have had time to have given us a better organized survey of the problems with which his volume deals, the succinct and graphic character of these notes will commend them to thoughtful students of current problems.

C. G. FENWICK

*Policy of the United States toward Maritime Commerce in War.* Prepared by Carlton Savage, Division of Research and Publication, Department of State. Vol. I, 1776-1914. Washington: Government Printing Office, 1934. pp. xvi, 533. \$1.25.

This valuable study attests both the importance attributed by the Department of State to the doctrine of neutrality and the skill of its author, Mr. Savage. The last 410 pages embrace a collection of 166 noteworthy documents, including state papers, treaties, court decisions, and Congressional resolutions, recording the attitude of the United States on the subject of the respective rights of neutrals and belligerents in maritime war. The first 121 pages consist of an analysis and systematic presentation of the essence of these documents arranged by historical period or subject matter. Apart from the chapters devoted to the several wars in which foreign countries or the United States were engaged during the years from 1776 to 1913, in which the story of neutral rights in its American aspects is developed, there are chapters devoted to the Latin American treaty system, proposals for immunity of private property, return to the principles of 1776 (around 1830), the Declaration of Paris, discussions of immunity 1867-71, the Hague Conferences and the Declaration of London. Both in the selection of the documents and in knitting them together in historical sequence the author has performed a service of outstanding merit. The work exemplifies the most useful type of Government publication, for it is informative in substance and calculated to give current discussions a much needed historical and philosophical perspective, and can hardly fail, by the sheer power of the argument and the practical character of its utility and humanitarianism, to impress on the public mind the impregnable soundness of the American position and the lucidity and ability of those statesmen who gave it expression.

The effort of the United States in behalf of neutrality won its way through the years by its essential reasonableness, by the benefits it conferred on the vast majority of human beings, and by the respect naturally accorded intellectual power enlisted in a practical endeavor. The policy was directed toward achieving the freedom from capture of all non-contraband goods even enemy-owned in neutral vessels—the so-called Free Ship Free Goods doctrine—and of neutral goods on enemy ships, both adopted in the Declaration of Paris; the abandonment of the British Rule of 1756 and the limitation of the doctrine of continuous voyage exclusively to absolute contraband, a closely restricted classification; the strict definition of contraband or else the abandonment of the conception in the interests of free trade; that blockades to be

respected must be actual and effective; and finally that private property at sea, including ships, should be immune—a contribution of Benjamin Franklin which found its way into several treaties and has remained a cherished American goal. Were it even now to be admitted, Disarmament Conferences would have better chances for success than they currently exhibit. Mr. Savage traces the story of the American efforts from the plan of 1776 down to 1914; on the political stage appear many of the celebrated names of American history. Apart from the consistency of the policy, all directed to minimizing the occasion for and the destructive consequences of war, there is something of an intellectual affinity between such state papers as John Quincy Adams' instructions to American ministers (Documents 69, 71 and 72) and Secretary Root's instructions to the United States delegates at the Second Hague Conference (Document 162).

Even though the United States momentarily rejected the Declaration of Paris because it abolished privateering, a supposed stimulus to the acquisition of a large professional navy—neutralized, it was thought, by suggesting an amendment providing for the immunity of private property at sea—and in spite of the Civil War cases—which nevertheless confined the doctrine of continuous voyage to actual blockades and absolute contraband—the policy has been practically unswerving. One can only hope that the confused aberration which affected it in certain quarters shortly after 1919, verbally purporting to make neutrality a thing of the past, will be dissipated by the realization that such a phantom would, if it materialized, be directly contrary to American interests and even to general peace. Small states would in all likelihood be the first to be sacrificed to Mars. It would dry up the last oases of sanity in a hysterical world and generalize destruction. The doctrine of neutrality was nurtured in a different cradle. That doctrine was not a policy of noble impulses, to be enforced by boycotts and wars. It was a policy of peace, designed to promote freedom for the individual, for trade and for private property, and to narrow the area of conflict and limit the devastating effects of war, so as to limit the necessity for great armies and navies. It was in the progressive tradition, had its roots in human experience and appealed to reason and the instinct of self-preservation. Under its ministrations the world experienced a degree of steady advancement it has not known for some years. It is not without significance that the current forebodings for the future of western civilization, accompanied as they are by an enormous growth in armaments and economic and social deterioration, are a concomitant of the disparagement of neutrality and of the evangelism for collective sanctions. With the coming of the airplane and the submarine, even those Powers which have heretofore stood out for unlimited belligerent claims—not rights—may find it to their interest to perceive the importance of neutrality and the rights of neutrals and thus save at least their part of the world from destruction. In that endeavor the makers of policy will derive sustenance from the wisdom recorded in the pages of the book under review.

EDWIN M. BORCHARD

*The Catholic Conception of International Law.* By James Brown Scott. Washington: Georgetown University Press, 1934. pp. xviii, 494.

For many years scholars have been indebted to the Carnegie Institute and to the Division of International Law of the Carnegie Endowment for International Peace, of which the author of the volume under review is Director, for the publication of the texts of the Classics of International Law. These texts, accompanied by introductions giving the biographical and other material necessary to an estimate of the work of the particular writer, have opened up to the student of international law new vistas in his study of the historical development of his subject. With their aid he has been enabled to see the interplay of ideas from one country to another during the formative period of international law and the growth of the fundamental principles of law in a world of changing external environment.

To Dr. Scott himself the publication of what may fairly be called *his* series has been the occasion of research studies into the work of the predecessors of Grotius, notably the Spanish canonists and theologians of the 16th century to whose work Grotius himself acknowledged his debt. Only recently there has appeared the first volume of Dr. Scott's trilogy on the *Spanish Origin of International Law*, a study of Francisco de Vitoria and his Law of Nations; the second volume being planned to cover the work of Ayala, Suárez, and other Spanish writers, and the third volume the work of the Italians, Belli and Gentili, and of Grotius. In the volume under review Dr. Scott has sought to survey critically and appreciatively, but in more popular form, the work of Vitoria and of Suárez, together with the writings of later jurists of the time, including Mariana, La Boétie, the author of the *Vindiciae*, Buchanan, and Bellarmine. The title of the volume is thus slightly more restrictive than its content, except in so far as the views of Protestant jurists are introduced to throw light upon ideas more strictly associated with Catholic writers.

The opening chapter of the volume presents a study of Vitoria's Law of Nations as contained chiefly in his disquisitions *De Indis* and *De Jure Belli*. This is followed by a chapter of comments upon "The Modern Law of Nations and its Municipal Sanctions" in which the author examines certain rules of modern international law in the light of the principles of Vitoria. The three following chapters deal with Suárez and his philosophy of law and of sanctions, and his conception of the state and of the extent of the supremacy of royal and of papal power. The six succeeding chapters are concerned chiefly with the problem of tyrannicide and of the relations of the individual subject to the authority of the state. A final chapter returns to Suárez and analyzes and clarifies his disputation *On War*, a treatise which, it must be confessed, makes in these days hard reading.

It is clear that throughout the volume Dr. Scott is seeking to expound the moral basis that underlies all law, national as well as international. In this age, as in the age of Vitoria and Suárez, there is, the author firmly believes, need to recognize certain great principles which are essential to the future de-

velopment of international law as a system which may be promotive of true peace. Justice in the first place, not a rigid justice in which each state is seeking first and last its national interests, but a higher justice which takes into account the interests of other members of the international community; good faith next, the mutual reliance of one nation upon the pledged word of another, without which all law is meaningless and ineffective; and lastly, equality, a mutual respect on the part of each nation for the personal dignity and human rights of other nations, and, in addition, a mutual sense of responsibility on the part of the leading members of the international community for the welfare of those lesser or "imperfect communities" which are not in a position to organize themselves so as to protect their own interests.

A number of readers may be inclined to think that here and there the author has been led in his enthusiasm for his subject to use phrases which ascribe too great relative importance to the contributions of Victoria and Suárez as contrasted with those of later jurists who appear to be no more than "their successors and debtors." Those who have worked through the great treatise of Grotius and have been astounded by his learning and impressed by his lofty morality may feel that his predecessors have in this volume been allowed to overshadow somewhat his own great contribution. But one need not be too critical of details in a work that is marked by the high idealism of Dr. Scott. For the same reason the reviewer is quite ready to overlook a few of the closing pages of the volume in which the author advocates a method of collecting international debts which the reviewer feels would not meet with the approval of either Victoria or Suárez, if he has read aright their "doubts" in regard to the enforcement of strictly legal claims.

C. G. FENWICK

*Il Procedimento di Mediazione e di Conciliazione avanti al Consiglio previsto dagli Art. 12 e 15 del Patto della Società delle Nazioni.* By P. Zanca. Palermo: Libreria Ciuni, 1933. pp. vi, 93. Index.

In this study the author analyzes the procedure of mediation and conciliation of the Council of the League of Nations according to Articles 12 and 15 of the Covenant. Chapter I deals with the juridical nature of a report by the Council, the distinction between the procedure of arbitration and the procedure before the Council of the League. The point is stressed that since the procedure before the Council may result in decisions that affect the interests of third states not immediate parties to the dispute, it is important to guard carefully the scope of the Council's procedure lest the position of states in the eyes of international law be prejudicially affected. Chapter II deals with various phases of the Council's procedure. The author specially emphasizes the point that Article 11 should be invoked only in cases where there is a real threat to world peace. Attention is given to the problem of domestic questions (Art. 15, par. 8), participation in Council meetings by non-member states, treaties providing for arbitration and judicial settlement as well as conciliation, the General Act, the Locarno Pacts and Article 36 of the

Statute of the Permanent Court. Political realities which always surround the procedure of the Council limit the value of the reports of the Council from the standpoint of their judicial excellence. In many respects the work of the Council may be likened to that of a committee of study. In Chapter III, the author discusses the ascertainment of fact and law before the Council, especially the appointment of commissions of inquiry and the requests sent to the Permanent Court of International Justice for advisory opinions.

Footnote references are, for the most part, to Italian works. Ray's *Commentaire* and other French works are cited. Philipse is quoted at several points. Wehberg, Schücking, and other German writers are cited. No references to English or American works appear in the study. The volume is significant, not only because of the careful and extensive examination of two of the most serviceable articles of the Covenant, but also in showing that the League of Nations is commanding more and more attention on the part of students in all countries.

J. EUGENE HARLEY

#### Briefer Notices

*Du Mariage, des Régimes Matrimoniaux, des Successions dans les Cinq Parties du Monde.* By Edouard Bourbousson. (Paris: Marchal et Billard, 1934. pp. iv, 604. Fr. 65.) This monograph is a study in the fields of comparative legislation and conflict of laws. It is a compilation of the various types of legal regulations pertaining to marriage and inheritances resulting from marriage. It is in no sense an interpretation or evaluation of these materials. The author has selected some 28 countries of the world and has presented them in alphabetical arrangement, together with their separate legal provisions as they relate to his subject of marriage. These rules include statutory laws, various codes, decrees, proclamations, and common law. Each of the 48 States of the United States, as well as the District of Columbia, is studied separately. This one phase of the work is obviously valuable to the American student of comparative legislation and conflicts of law. In the main M. Bourbousson arranges his materials, relative to each country, within three categories. In the first division consideration is given to regulations covering certain general questions of marriage, such as age, consent, publication, nullification, and dissolution. Then follows a section presenting the rules relative to the forms of marriage, effect of marriage on property, and the legal capacity of the wife. Finally the author compiles the many regulations pertaining to inheritances and wills. This meticulous compilation admirably shows the relationship of each type of legislation to the other, and in turn to the development of a unified system of jurisprudence which would cover these questions. It exposes the network of conflicting rules and regulations which must always serve as the point of departure for those who believe in the unification of laws. It is to be regretted that the author does not consistently give an exact citation to the source of each individual rule or statute to which reference is made.

CATHERYN SECKLER-HUDSON

*La Questione del Pacifico vista da un Orientale.* By Taraknath Das. (Rome: Istituto Italiano, 1934. pp. 48. L. 2.) In this booklet, the author—a native of India, who received his higher education in the United States and is an American citizen—stresses the growing importance of Pacific prob-

lems, which are of concern not only to the states bordering the Pacific, but to all the larger countries having political and economic interests there. One of the major policies of Japan in the Orient is to "eliminate the political and territorial dominion of European countries in the Far East and to affirm Asian independence under Japanese hegemony." A large part of the work is devoted to a historical review of events that have occurred in the Far East during the past four decades. The Anglo-Japanese commercial rivalry is an outstanding factor in Far Eastern politics. The author sees in the Philippine independence legislation a great example for other Oriental peoples to be freed of foreign domination. The peoples of Asia and India want racial equality and a chance to live; they want the collaboration, not the domination, of Europe. The Government of the United States does not want to see a war between Russia and Japan. Russia does not want war with Japan. A war between Japan and Great Britain is not inevitable but is probable. The greatest Japanese victory, however, lies along the pathway of conciliation and peace.

J. EUGENE HARLEY

*Der Rechtserwerb vom Nichtberechtigten an beweglichen Sachen und Inhaberpapieren im deutschen internationalen Privatrecht.* By Konrad Duden. (Berlin and Leipzig: Walter de Gruyter & Co., 1934. pp. 137.) This monograph, published under the auspices of the *Institut für ausländisches und internationales Privatrecht*, of Berlin, treats of the German conflict of laws relating to the acquisition of ownership, in case of unauthorized transfers, in (1) chattels and (2) bearer bonds and bearer shares. Contrary to our own law, a possessor of chattels has frequently the power under Continental law to transfer greater rights therein than he himself has. From the standpoint of the conflict of laws, however, these differences have not led to serious disputes, because of the general agreement today that the *lex rei sitae* governs rights in chattels. The author applies the same rule to the determination of the transferee's right to retain stolen or lost chattels until payment of the price paid by him. With respect to bearer bonds and bearer shares, much controversy has arisen on the Continent owing to the French legislation, which is held by the French courts to be applicable to transfers abroad, seeking to protect the owner of such paper in case of theft or loss. Many different views have been held in regard to the question how far the French legislation should be respected by the courts of other countries. The author advances the view that the *lex rei sitae* should be deemed to control in Germany not only the property rights in the bearer bonds or bearer shares, but also the incorporeal rights evidenced by the paper. The conclusion is reached on the basis of the German notion of bearer instruments, which incorporate the "debt" in the paper. Whether or not such incorporation is to be deemed to have taken place from the standpoint of the conflict of laws is to be determined, according to the author, with reference to the law governing the "debt." The monograph is of no great interest to Anglo-American readers. It would have been of wider usefulness if it had dealt with the subject in a more practical and realistic manner.

ERNEST G. LORENZEN

*Questions de principe relatives au statut international de Dantzig.* By Jean Hostie. (Brussels: Bureau de la Revue de Droit international et de Législation comparée, 1934. pp. 95.) Some 65 publicists have in the past been interested enough in the unique status of the Free City of Danzig under international law to give it their special attention. In the present study, which is a reprint from the above-mentioned *Revue*, M. Jean Hostie, Secre-

tary General of the Central Commission for Navigation on the Rhine River and member of the Permanent Legal Committee on Communications and Transit of the League of Nations, adds his interesting but not entirely novel conclusions to the existing array of conflicting opinions. He finds that "the Free City of Danzig . . . is a State in the international sense of the word. The relations between the Free City and other states—including Poland—are exclusively governed by international law" (p. 93), a conclusion which coincides fully with that of the reviewer. M. Hostie happily elaborates it in its various aspects, both factual and in legal theory. His documentation is careful and his legal reasoning cogent and well organized. The study is valuable mainly as a well-done résumé of the various legal questions involved in the problems of Danzig's international statehood. JOHN BROWN MASON

*European Governments and Politics.* By Frederic A. Ogg. (New York: Macmillan Co., 1934. pp. x, 905. Index. \$4.25.) This volume by Professor Ogg is of interest to students of international relations only in so far as an intelligent knowledge of the systems of government of the individual states is required in order that their dealings with one another may be fully understood. Especially is this understanding needed with reference to the constitutional processes of these governments when exercising their treaty or war-making powers. Upon these specific topics, Professor Ogg has not much to say. Indeed, only with regard to Great Britain, the British Dominions, and France is the matter touched upon. While it is thus evident that an extended and critical review of the volume does not find a proper place in a journal devoted primarily to questions of international law and international relations, the reviewer feels that he should at least state the scope of the volume and his opinion as to its general merits. The work deals with only the five Governments of Great Britain, France, Germany, Italy and Russia, and only with the first of these at any considerable length. Almost half of the volume is devoted to the Government of Great Britain, and constitutes a considerable treatise in itself—437 pages. It is, in fact, based upon a volume entitled *English Government and Politics* published five years ago by Professor Ogg; but it is much more than a condensation of that work, for, as the author points out in his preface, "How much can happen in five years, even in a country which holds to its political heritage as faithfully as does modern Britain, is illustrated impressively by the new matter which it has been necessary to introduce and the changes of emphasis and interpretation which events have forced upon me." Less than 100 pages are devoted to France, 165 to Germany, only 36 to Italy, and about fifty to Russia. In general, the work deserves the highest praise. The account of the constitution and present working of the British Government is the best with which the reviewer is acquainted, and, while the descriptions of the other four governments dealt with are brief, they exhibit a fine ability to discern and describe the features that most need to be explained and emphasized. W. W. WILLOUGHBY

*British Opium Policy in China and India.* By David E. Owen. (New Haven: Yale University Press, 1934. pp. xii, 399. Index. \$4.00.) This volume is divided into twelve chapters, to which are added a bibliographical note, then some facts on currency and weights connected with the measurement of opium in India and China, and an index which is above the average. The chapters dealing with the establishment of the opium monopoly in Bengal, that upon the early trade at Canton, that on monopoly exercised by the East India Company, are good and well balanced. But in that dealing with

the historical introduction there are three slips. On page 4 there is a slip in copying from Duarte Barbosa (Vol. I, p. 122),—the word "forthwith" is omitted. On page 11 the word *Ya-Pien* is used for opium; this should be *Ya-Pien-Yen*, though the more popular word in ports is *Ta-Yen*, which two words are also in part used in describing the opium craving,—the opium pipe, and the opium sot. Also on this page the reference to Hirth and Rockhill's *Chau-Ju-Kua* (p. 14) should have been "618-626." Again in dealing with the growing of the opium poppy since the institution of the Republic in 1911, the author might have been more generous in his quotations from the foreign press published in China, wherein many of the forms of compulsion used by the war lords have been so adequately described. While because of this increased cultivation of the poppy, China has become one of the largest markets for the opium drug, too often the high prices obtained by the peasant farmer meant the difference between slight financial comfort and misery. The author seems to have determined to leave out of his volume any account of the non-Indian opium trade with China; indeed in his preface (p. viii) he says that the international aspect of this trade was from the standpoint of his book irrelevant. Making due allowance for these self-imposed limitations on his book, and its portraiture of the opium question, it can be added that it is a pleasure to welcome a volume so free from the usual propagandist attitude, the customary distortion of facts and policies which have been the stock-in-trade of books on this age-old problem.

BOYD CARPENTER

*China Year Book, 1934.* Edited by H. G. W. Woodhead. (Shanghai: North China Herald, 1934. pp. xxviii, 855. \$12.50; American Agency: University of Chicago Press.) The sixteenth issue of this invaluable publication follows the lines of its predecessors. The essential facts upon the geography, population, trade, institutions and activities of the country are presented in accurate descriptive and statistical form. Of special importance to students of government and international law are the chapters on government, legal development, the Kuomintang, and international relations. A useful feature is a "Who's Who" of prominent Chinese. The index, as usual, is excellent.

Mr. Woodhead, the editor, makes a practice of including special materials on timely subjects or historical topics. In the current issue he publishes the text of the draft constitution now under discussion in the Legislative Yuan and the remarkable report of Dr. Ludwig Rajchman to the League of Nations on reconstruction. Other new chapters are those on the press, on the effect of the Chinese nationalist movement upon the Roman Catholic Church, to which is appended a chart exhibiting the position of the Church in 1933, and on Manchoukuo. It may be observed that the writers of such special contributions vary considerably in their standards of scholarship. Objectivity can hardly be claimed, for instance, for the article on Manchoukuo, since the unnamed author entirely neglects the circumstances under which the intervention of September, 1931, occurred, as well as the subsequent military occupation and the part of Japan in the creation of the new state. On the other hand, Mr. Owen Lattimore's chapter on Outer Mongolia and Sinkiang is as thoroughly scientific as materials permit.

HAROLD S. QUIGLEY

*Das Küstenmeer im Frieden.* By Hanns-Wolff Coenen. Frankfurter Abhandlungen zum modernen Völkerrecht, Heft 38. (Leipzig: Robert Noske, 1933. pp. xiv, 119. Rm. 5.) Dr. Coenen has summarized some of the his-

tory of international law as applied to coastal waters. He relies to a large extent on Schücking and Strupp. Otherwise his study is marked by an absence of references to secondary material. Most of this monograph is already available *in extenso* in Raestad, Jessup, Fulton and others. It ends with a plea for an international "*Wasseramt*." That proposed office for the regulation of territorial waters was originally suggested by Alvarez, adopted and abandoned by Schücking, and revived by Strupp. Dr. Coenen comes to the support of Strupp. The appendices contain the various projected schemes for the codification of the law of territorial waters.

*Die technischen Fragen des Küstenmeers.* By Fritz Münch. (Kiel: Institut für Internationales Recht, 1934. pp. viii, 187.) The bulk of this work consists (1) of an historical introduction to the law of territorial waters, and (2) of a somewhat extended treatment of the "Bases for Discussion" suggested by the Preparatory Commission of the Conference for the Codification of International Law (1930). There is a freshness and originality of analysis which make the work valuable to anyone interested in the topics which it discusses. The author is perfectly familiar with the source material with which he is working, and he makes use of it in a very telling manner. The monograph is well documented. The only serious criticism is that sometimes the author deals with the suggested solutions as if they were actually law.

THORSTEN KALLJARVI

*Peace and War.* By Guglielmo Ferrero. Translated by Bertha Pritchard. (New York and London: Macmillan Co., 1933. pp. x, 244.) Only the first two essays of the five contained in this small volume concern the topic suggested by the title. After discussing the "classic art" of war circumscribed by precise rules in the eighteenth century, Professor Ferrero contrasts the "super wars" of modern times which he regards as the negation of real war. Citing Vattel as his authority, he proceeds to show that the world has also lost the art of making peace, although Locarno, the Dawes Plan and the Young Plan were a return to "Vattelism." Although contributing nothing new to the subject, the book proves interesting reading, yet is much open to dispute in its generalities.

*An Introduction to Some Problems of Australian Federalism.* By Kenneth O. Warner. (Seattle: University of Washington Press, 1933. pp. xii, 312. Index. \$2.75.) Considered as a study in comparative government, this book is deserving of a longer review, for the author presents a careful and well-documented study of the relationship between the Australian states and the Commonwealth, especially with reference to financial matters. It is not to be expected, therefore, that the reader will find here an extended treatment of foreign relations. About nine pages, based largely upon Keith, suffice to cover external affairs.

LIONEL H. LAING

*American Consultation in World Affairs for the Preservation of Peace.* By Russell M. Cooper, with an Introduction by James T. Shotwell. (New York: Macmillan Co., 1934. pp. xvi, 406. Index. \$3.50.) As Mr. Shotwell says in his introduction, "this is an important book. It is a history of the way in which the post-war structure of pacific relations has been challenged in the last three years by the world-old methods of force and violence. It is a study of the strategy of peace." The volume contains a careful analysis of the Sino-Russian dispute of 1929, the Chaco conflict, the Manchurian conflict and the Leticia dispute. It would be difficult for any reader to follow the detailed history of these "crises" without reaching the conclusion that international

consultation is essential to the maintenance of the world's peace, and that preparation for such consultation must be made in advance. The author has worked in a detached, dispassionate mood. He has made an admirable contribution to American literature on the subject, and it deserves a wide circulation.

*Documents on International Affairs, 1933.* Edited by John W. Wheeler-Bennett and Stephen A. Heald. (New York and London: Oxford University Press, 1934. pp. xiv, 536. \$10.) This is by far the best series of collections of current documents now appearing in English. It is of value, both for immediate and for future purposes. The selection and editing of the documents are admirable. Only the excessive price of the volume should stand in the way of its wide use.

*Criteria of Capacity for Independence.* By Walter Holmes Ritsher. Publications of the Faculty of Arts and Sciences, American University of Beirut, Social Science Series No. 8. (Jerusalem: Syrian Orphanage Press, 1934. pp. xii, 152. Index.) This is a welcome study of a timely problem, and it reflects credit both on the author and on his university. Conditions set for the independence of Iraq, the Philippines, and India are analyzed through the various changes rung on them, and they are compared with the standards for emancipation set by the Permanent Mandates Commission. Some attention is given, also, to the practice and theory of the recognition of states and the admission of states to membership in the League of Nations. The author's statement of "valid tests of a capacity for independence" (p. 133) is of especial interest. His book deserves a place among the best of the current books on political theory.

MANLEY O. HUDSON

*Die Panamerikanische Union und ihre Rechtsnatur im Völker- und Landesrecht.* By Fritz Ermarth. (Berlin-Grünwald: Verlag für Staatswissenschaften und Geschichte, 1934. pp. viii, 60. M. 5.) In this little study the German author, who is also an S.J.D. of the Harvard Law School, gives first a survey of the Pan American movement and of the history and organization of the Pan American Union. But he is primarily interested in the theoretical question as to what this Pan American Union is in law. It is, according to positive law still in force, a phenomenon of international law, although the act of foundation is not an international treaty but only the resolutions of the Pan American Conferences; it is a person in the particular international community of the twenty-one American Republics, with its own international rights and duties, with a certain autonomy, and with a minimum of subjectivity in the municipal law of the member states, a minimum rendered necessary by this particular international law. It is not universal in aim; it is limited mostly to technical activities. It is of the type of international administrative union, and, therefore, very different in character from the League of Nations. This theoretical study shows clearly what great practical progress would be achieved if the Havana Resolutions of 1928 were to come into force; for that would take the Union out of the present somewhat ambiguous situation in law. It would make the Union of American Republics a particular international community with a personality of its own in international law, based on an international treaty, and possessing two special organs: the Pan American Conference and the Pan American Union.

*Der Begriff "Militärluftfahrzeug" im Luftrecht.* By Erwin Riesch. (Berlin and Bonn: Ferd. Dümmler's Verlag, 1934. pp. 100. M. 6.) This is a study of the conception of "military aircraft." The author gives a detailed analysis of all the different conceptions and criteria set up in scientific works,

international congresses, collective and bilateral international treaties, as well as the municipal laws of the different states in the period prior to 1914, during the World War, and in the epoch following the World War. He shows that not only did the Versailles Treaty forbid to Germany any kind of military aviation, but that thereafter the notes of the Conference of Ambassadors of April 14, 1922, and June 24, 1925, as well as the agreements with Germany of May 22, 1926, defining the conception of "military aircraft," brought in quite different criteria which not only discriminate against Germany but also profoundly hamper the progress of German civil aviation. The struggle for Germany's liberty in the domain of aviation must principally be directed against these discriminating definitions. The study is, therefore, intended to be a scientific contribution to a problem which actually concerns Germany most: her status of equality within the international community.

*Wiener Kongress/Versailler Vertrag. Ein Vergleich.* By Curt Christof von Pfuel (Berlin-Grünwald: Verlag für Staatswissenschaften und Geschichte, 1934. pp. xiv, 96). This little study is a sketch of a comparison between the great peace treaties of 1815 and 1919. The fundamental difference, according to the author, consists in the fact that in 1815 a peace treaty was created by diplomatists by way of negotiations between equals, whereas the Versailles Treaty is a unilaterally dictated treaty, made by parliamentarians. The author inquires into the similarities and differences with regard to all the clauses of the two treaties, beginning with their attitude toward the problem of amnesty up to the clauses designed to develop general international law, and closes with a comparison between the Holy Alliance and the League of Nations.

*Der Vorbehaltene Betätigungsbereich der Staaten (domaine réservé).* By Eberhard von Thadden. (Göttingen: Vandenhoeck & Ruprecht, 1934. pp. 100. M. 5.) Article XV, paragraph 8, of the Covenant of the League of Nations excludes from the competence of the Council disputes which, in the opinion of the Council, arise out of a matter "which by international law is solely within the domestic jurisdiction" of one party. To clarify the domain of these affairs is the purpose of this little study. The author shows that this formula is also to be found in many bilateral treaties of arbitration or conciliation. He is right in insisting that this conception can be defined only as a conception of *general* international law. He shows that the affairs solely within domestic jurisdiction are to be identified neither with the "vital interests," nor "the fundamental rights," nor with "sovereignty," nor with "political disputes"; neither can a definition be reached by the enumerative method. "Affairs solely within the domestic jurisdiction" are rather all the affairs regarding which positive international law imposes no restrictions on sovereign states. But even in these affairs the liberty of the states is not unrestricted, as they are bound by the recognition of the concurring competences of the other states, because this freedom of action is recognized only within the limits of the personal and territorial competences of the states. The conception of affairs "solely within the domestic jurisdiction" changes with the change of the general or particular international law binding upon a given state. The notion is, therefore, in the terms of the World Court, essentially a relative one.

*Internationale Strafgerichtsbarkeit.* By H. von Weber. (Berlin and Bonn: Ferd. Dümmler's Verlag, 1934. pp. 176. M. 8.) In the period since the World War a movement has sprung up for the creation of an International Criminal Court, a movement furthered by scientists and by international institutions, such as the International Law Association, the Interparliamentary Union, and the International Association of Criminal Law. The proposals

made were not only often politically prejudiced, anti-German—for the whole idea was an outcome of Articles 227–231 of the Versailles Treaty—but vague and embracing the most varied topics, e.g., an International Criminal Court was proposed for the solution of conflicts of criminal competence between the states for the struggle against so-called “international criminals”; for the decision of the so-called *delicta juris gentium* committed by private persons; for the decision in criminal cases of private individuals, in which there is a danger of partiality, should the case be decided by a national court; for the punishment of the so-called “war crimes”; and finally as an International Criminal Court against States, deciding upon the “international crime of a war of aggression.” This study gives an excellent survey of the history and an analysis of this movement, regarding all its many proposals from the point of view of international penalties, the constitution and procedure of such an International Criminal Court, and of the practical possibility of an international criminal justice. The greater part of the study is dedicated to the problem of penal sanctions for the protection of international peace. Here the author gives us a penetrating inquiry into the elements and difficulties of this problem, very worth-while reading, especially for the international lawyer.

JOSEF L. KUNZ

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\* Mention here does not preclude a later review.

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## BELLIGERENT AIRCRAFT, NEUTRAL TRADE, AND UNPREPAREDNESS

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While a duty of preparedness for war is constantly urged upon American statesmen and upon military and naval officers, the fact is too often overlooked that there is also a duty of preparedness resting upon American statesmen, jurists, and legal authors to keep abreast of the times, or even in advance of the times, in connection with rights and duties affected by war. A prominent international lawyer has written that "as the flag of a nation follows the territorial explorations of its subjects, jurisprudence follows the path of science." This broad statement must be qualified by the admission that jurisprudence only follows at a very long distance. Too rarely do statesmen and lawyers try to visualize changing industrial, economic, social, and governmental conditions, and to promote, *in advance*, needful corresponding changes in the law. Especially in connection with international law and international agreements is the gift of imagination lacking, the possession of which is necessary in order to attain preparedness in any field.

Let us take a practical example of lack of vision, in connection with international relations, by American Congresses (comprised largely of lawyers). Our present neutrality laws date from the year 1818 (slightly amended in 1838). At that date (and at the earlier dates of the original neutrality laws of 1794 and 1800), when Congress decided that a neutral nation ought to punish hostile acts committed on its territory and directed at one or both of the belligerents, the only hostile acts which it could conceive probable were—sending out military expeditions, fitting out ships from our ports, accepting commissions and enlisting troops on our soil; hence these were the acts which it forbade by statute. But during the one hundred years after 1818, there had developed the invention and widespread use of explosives, and passage across our boundary lines had become easy for anyone desiring to commit acts of hostility against one of our neighbors who might be engaged in a war in which the United States was neutral.

✓ What efforts did Congress during those one hundred years make to anticipate and provide for the punishment of new types of hostile acts by or against a belligerent which might originate on our soil? The answer is—exactly none. The result was, that when, in January, 1915, Werner Horn, a German reserve officer, went up to Vanceboro, Maine, with a dress-suitcase filled with dynamite and proceeded to blow up the International Bridge in Canada and then returned into this country, the United States Government

found itself faced with a rather unpleasant international complication, and, apparently, with no Federal statute applicable or adequate for the punishment of Horn's act. It did not then seem to the Department of Justice that one single individual could be indicted as a "military expedition" within the meaning of the neutrality statute forbidding such military expeditions; and there was no other Federal law which made it a crime to execute a successful plot in this country for the destruction of property within the confines of a friendly nation. Finally, the United States was obliged to indict (and convict) Horn for violation of a statute which merely prescribed methods of interstate transportation of explosives (for violation of which the maximum penalty was only eighteen months' imprisonment).

So, too, in 1915, when German military men, ship-captains, chemists and officials, like Robert Fay and others, were indicted for conspiring to place bombs in ships to blow them up at sea, the only Federal statutes under which we could at first indict them were two sections of a law enacted in 1825; and to illustrate the inadequacy and inapplicability of this law to modern bomb plots, one need only state its phraseology—one section punished a conspiracy "to cast away or destroy any vessel . . . with intent to injure any person that may have underwritten any policy of insurance" on such vessel; the other section punished anyone who "by surprise or by open force maliciously attacks or sets upon any vessel with an intent unlawfully to plunder the same or despoil any owner thereof." So, too, when evidence was discovered in 1915 of a conspiracy fostered by Franz von Rintelen and others to blow up and otherwise destroy munition factories and other property destined for shipment to one of the belligerents, the only Federal criminal act for which they could then be indicted was for restraint of trade under the Sherman Anti-Trust law.

Thus, it will be seen that many of our troubles were largely due to the lack of any forehanded attempt by Congress to visualize and guard against possible new activities on neutral soil due to new factors arising since 1818. (Fortunately, the Attorney General of the United States persuaded Congress, in 1917, to enact new legislation which will afford some proper remedies in any future war.)

Now, turning from domestic legislation to international law, let us consider a practical illustration of either lack of ability or lack of willingness or energy to apply thought to problems which were almost certain to arise and for which some sort of international law or agreement should have been provided in advance. In the fifteen years prior to the outbreak of the World War, three things were happening, to which forward-looking international statesmen and international lawyers should have been giving constructive thought, with reference to their effect upon any future war and the law applicable thereto. First, the European naval Powers were so building their new merchant ships as to be capable of bearing armament. Second, in 1900, the United States and Great Britain had ordered the addition of

submarines to their navies; in 1906, Germany took up construction of submarines; and in 1908, the application of Diesel engines to submarines made that type of ship a potentially powerful part of all navies. Third, by the year 1908, the aëroplane had been so developed that Wilbur Wright had remained over two hours in the air at LeMans, in France; in 1909, Blériot had flown across the English Channel; by 1910, Paulhan had flown from London to Manchester with only one stop; and aëroplanes had actually been used in the Turko-Italian War of 1911 and in the Balkan Wars of 1912-1913. That new problems arising out of these new factors would inevitably have a powerful influence upon the conduct and law of war in the future was something which clearly should have engaged the attention of all Americans dealing with international relations.

What consideration was given to these subjects by American governmental authorities between 1900 and 1914? As to submarines and as to armed merchantmen, no attention was paid by our Government in any public act. As to the relation of aircraft to warfare, our Government joined in the action taken by the Hague Conference of 1907; but this action was confined to a convention prohibiting for a limited time "the discharge of projectiles and explosives from balloons or by other methods of a similar nature," and to a convention forbidding "the bombardment by naval forces of independent ports, towns, villages, dwellings or buildings." In the thirteen volumes published by the United States Naval War College from 1901 to 1913, inclusive, under the name of *International Law Situations*, containing discussions of practical problems under the direction of Professor George Grafton Wilson, there was no reference whatever to submarine vessels or to armed merchantmen; and the only article on the use of aircraft in war was in 1912, in which practically no views were expressed as to the future development of the law on that subject, and hence no constructive discussion.

What consideration was given to these subjects by American jurists and international law writers, between 1900 and 1914? In the five major works on international law by American authors between these years, neither the subject of submarines nor the subject of armed merchantmen was mentioned; and on the subject of aircraft, comment was confined to somewhat cursory statements as to the Hague Convention of 1907. In the law magazines also, there was scanty consideration of either of these three topics. A pioneer address on aircraft in connection with international law made in December, 1908, by Arthur K. Kuhn, appeared in the *Proceedings of the American Political Science Association*; but with this exception, nothing relative to submarines, armed merchantmen, or aircraft appeared in either the *Proceedings* or the *Review* published by that association.

In the seven volumes of the *AMERICAN JOURNAL OF INTERNATIONAL LAW* from 1907 to 1913, inclusive, there was no article or note on the subject of armed merchantmen or of submarines. As to the possible use of aircraft in war, two articles relative to projectiles and explosives from balloons appeared

in 1908, one by Professor James Brown Scott and the other by General George B. Davis, in which so little thought was given to the probability of aerial warfare that each writer expressed the view that "land and water offer a sufficient field for war." The first articles in the JOURNAL treating of aeroplanes appeared as follows—two in 1910, written by Professor Simeon E. Baldwin and by Arthur K. Kuhn; one in 1912, by Professor Amos S. Hershey; and one in 1913, by Blewett Lee. But while each gave some little consideration to legal problems likely to arise from war in the air, it was not until April, 1914, just before the outbreak of the World War, that there appeared any detailed discussion of the probable operation and necessary adjustments of law due to the use of aircraft in war—an article by Wilmot E. Ellis, entitled "Aërial Land and Aërial Maritime Warfare." Mr. Ellis, moreover, was the first writer to treat his topic realistically, in saying that "the most profitable way of studying our subject is to determine what belligerents will do, rather than what they ought to do."

And so the outbreak of the World War found the United States Government as a neutral, possessed of very little assistance from previous American contributions to the consideration or solution of the grave problems arising from the three new factors above mentioned.

Since the conclusion of the World War, how far have there been any constructive suggestions to solve new problems developed by that war? Let us consider one practical illustration of the lack of preparedness in this connection. Nothing in the World War occasioned more serious international problems than the treatment of neutral merchantmen by the belligerents, especially the British practice of requiring neutral vessels to deviate from their course and into British ports for the purpose of search and seizure, and the German practice of destruction of neutral vessels by submarines regardless of the rules theretofore applicable to search and seizure.

In a future great war, however, even more serious problems of this nature will be presented in connection with neutral vessels; for in addition to attack by submarines, there will in the future be attacks by aircraft. ✓ Naval officers in every country are probably now discussing the use of dirigibles and aeroplanes, both from a land base and from a ship base, for the purpose of stopping neutral merchantmen on the high seas and ordering them to deviate from their course for the purposes of search, with the penalty of bombing from the aircraft if they refuse to deviate. ✓ When we recall that the right of the submarine to torpedo neutral vessels contended for by Germany has never yet been adjusted by international action, when we recall that the Washington Treaty of 1922 at the Limitation of Arms Conference restricting use of submarines has not been ratified by all its signers and was not even signed by Germany, it will be seen what a tremendous problem will be presented to neutrals in a future war, when a neutral ship will run the risk not only of being torpedoed from the sea but of being bombed from the air or sprayed with poison gas.

In an article entitled, "Winged Warfare and the League of Nations," in the *New York Times Magazine*, January 20, 1919, I wrote:

Now, however, the most urgent question before the nations is not: what shall be the future law of the sea? But rather, what measures shall be framed to deal with still newer weapons now developing—the airplane, the aerial torpedo, the aerial discharge of gasbombs, the employment of wireless for detonation of enemy explosives and for other hostile purposes. These new weapons must inevitably produce a fundamental change in the methods and conditions of future warfare. Yet little attention has thus far been paid in public discussion to their possible effect upon the international problems now to be settled and upon the future relations of the world. . . . Suppose that nations shall agree to forbid attack by submarines on ships; is such a rule to apply to attack by airplane? How can an airplane identify a merchant ship? How can it exercise right of search? How can it provide for safety of passengers and crew? How is a sea blockade to be enforced against airplanes? What effect is the ease and speed with which air attacks can be launched to have on the rules as to initiation and declaration of war? What actual protection can neutral territory have against aerial passage?

I further called attention to many other probable modifications of the laws of war and neutrality which aircraft might entail in the future. Professor Charles Cheney Hyde in his *International Law*, published in 1922, said: "It is not unlikely that, in the future wars, the employment of aircraft in offensive operations may prove, in fact, the most terrible and the most effective means of overcoming a foe not prepared to cope defensively therewith." Professor George Grafton Wilson, in 1930 before the Naval War College, said that aircraft "will be an increasingly important factor in war," that "aerial commerce makes old rules in regard to contraband, blockades, etc., of doubtful applicability," and that "commerce may be interrupted in a manner hitherto impossible, and an economic war may become more effective." ✓James M. Spaight, an Englishman, in his book entitled *Aircraft and Commerce of War*, published in 1926, spoke thus of the effect of aircraft in the next war:

(Visit and search at sea by aircraft will always probably be difficult. . . . Most probably there will be no visit at all. Ships will be ordered to named ports and if they take the risk of disobeying the order and persist in disobeying it, they will be attacked and perhaps sunk. The conditions of 1915-1918, may be reproduced in an aggravated form. ✓The position of neutral commerce will indeed be well nigh intolerable. ✓Freedom of the sea will be dead and gone. ✓Neutral shipping will be policed and dragooned as it never has been before. ✓It was scourged with whips in 1914-1918; it will be scourged with scorpions in a future war. Because the complete interruption of all neutral trade beneficial to the enemy will be more important than ever, because the grip on that trade will be tighter than ever and evasion more difficult, the conflict of belligerent and neutral interests will be sharper, the consequent

disputes more bitter, and the danger of actual war with neutral States greater than in the past.

In view of such descriptions of the possible effect of the development of aircraft on future warfare, one would suppose that American statesmen and international lawyers would be persistently making efforts, prior to the outbreak of a future war, to arrive at some agreement as to the applicable law. Here certainly would seem to be a field imperatively demanding legal preparedness. Yet what has been done about it? What is the situation which confronts us?

(Nothing whatever was done by governments internationally with relation to the military and naval problems presented by aircraft until four years after the World War. Then, on December 11, 1922, pursuant to a resolution of the Washington Conference of February 4, 1922, a Commission of Jurists comprising delegates from the United States, Great Britain, France, Italy, Japan, and the Netherlands met at The Hague and prepared a set of Rules of Aërial Warfare.)

What has happened to these Rules since their preparation and signature on February 19, 1923? Exactly nothing, so far as the nations are concerned.

Now, so far as the Rules dealt solely with the permissible or prohibited action of aircraft as between the belligerents themselves, perhaps it is of little consequence whether or not such rules of warfare shall have been agreed upon and settled, before a future war. There are always two conflicting theories of warfare—a contest between desire for speed of victory and hope for humane warfare—wherefore, nations may reasonably differ as to the desirable limits of aërial bombardment of cities and civilian populations. It is also possible to take the view that the fewer rules restricting methods of warfare the better; and, as Simeon E. Baldwin said, in 1910, "it may well be doubted whether peace is promoted by making war less terrible. . . . When war comes, the deadlier it is, the shorter it will be."

On the other hand, it is of high consequence that the respective rights and relations of and between neutrals and belligerents should be settled, in advance of war; for, during the progress of a war, unsettled rules of law and the consequent inflammatory conflicting contentions endanger the possibility of the maintenance of neutrality. (It is highly disappointing, therefore, that the nations represented at The Hague failed absolutely to agree on any rule on one of the most important subjects before them, namely, the regulation of the use of aircraft with reference to neutral vessels in time of war.)

✓The American delegates proposed a rule, which was supported by the Dutch. The English proposed a different rule which was supported by the Italians. ✓The Japanese proposed a third rule but finally agreed to the American proposal. The French proposed a fourth rule which no other nation accepted. The significant fact to be noted is that it was the French and British naval Powers, those most likely to be future belligerents, who

advocated the greater aircraft powers; while it was the Dutch and the Americans, the Powers likely to be neutral, which supported restricted powers. Germany, had she been a party to the conference, would undoubtedly have supported for aircraft the same broad powers which she claimed for her submarines in the World War. (Thus, in a future war, the neutral nations, unless something shall be done about it beforehand, may find themselves faced with the destruction of their merchantmen at the will of the belligerents, in threefold measure—by ships, by submarines, and by aëroplanes.) And who is doing anything about it in this country?

In 1930 and 1931, Professor George Grafton Wilson, in the Naval War College *International Law Situations*, discussed the subject, but he did little more than state the problem before The Hague.

To what extent has the AMERICAN JOURNAL OF INTERNATIONAL LAW considered the point on which the Hague Conference failed to agree? Since 1923, it has given no consideration to it whatever. In the October, 1923, number of the JOURNAL (Vol. 17), Rear Admiral William L. Rodgers (Technical Adviser to the American delegation at The Hague), wrote an article on "The Laws of War Concerning Aviation and Radio," descriptive of the work of the conference, in which he made the significant comment that "it is doubtful if this demand for a code of rules for these two new agencies was felt by combatants so much as by the public. Technical representatives at The Hague of at least one Power said informally in conversation that to them personally the last war had not emphasized the need of any formal addition to the laws of war for the purpose of dealing with aviation and radio." This sentiment is of the highest importance; for it shows that the belligerent Powers are perfectly willing, in the next war, to apply to aëroplanes the same methods of war operation which they applied to their surface warships and to their submarines in the last war. In other words, the belligerent Powers are perfectly willing to raise the same serious questions with neutrals which they raised in the World War; and neutrals will be confronted with the same or even more difficult problems as to how to keep out of the war, if they desire to preserve any neutral rights of trade.) Admiral Rodgers concluded his observations with the following discouraging statement:

This point is left open, perhaps to be regulated by some future international conference, or if not, to the practice of the next maritime war. The divergence of national views as exhibited at this conference may be such as to render it possible and even probable that an international agreement on this point may not be reached previous to the next great maritime war, whenever such may chance to arise.

In the *Annual Proceedings of the American Society of International Law* in 1930, the subject for papers and discussion was "Possible Restatement of the Law Governing the Conduct of War on the Sea," and in the *Annual Proceedings* of the Society in 1932, papers and discussion were presented on

"International Law of Air Navigation." It might be supposed that both of the topics would have presented a field for suggestions as to the future law of aircraft and neutral trade; but nothing was said on the subject.

No one of the seven or eight major American books on international law published since the World War gives any consideration whatever to neutral rights in relation to aircraft. Since 1930, there have been two magazines in this country exclusively devoted to air law and air problems—*The Journal of Air Law* in Chicago, and the *Air Law Review* in New York. While they have published several articles on aviation in time of war, not one has considered the question of relation of aircraft to neutral trade.

✓ The fact seems to be, as Professor Garner stated in 1932, that the work of The Hague Commission of 1923 has been forgotten, international learned societies have "apparently ceased to concern themselves with the problem," and public opinion appears to have become in large measure indifferent. "Indeed," says Garner, "there appears to be less and less readiness to prohibit or restrict the use of an instrumentality of such demonstrated potency and future possibility and a corresponding disposition to overlook the frightful consequence to civilization to which its unrestricted uses may lead."

(It is possible that some of the lack of attempts to try to reach an agreement on the law on this subject may have been due to the fact that the League of Nations Conference for the Reduction and Limitation of Armaments at Geneva has for over two years been considering and discussing the question of the entire abolition of bombing from the air.) At its meeting of June 22, 1932, Ambassador Hugh S. Gibson submitted the proposal of President Hoover that "all bombing planes be abolished. This will do away with the military possession of types of planes capable of attacks upon civil population and should be coupled with the total abolition of all bombardment from the air." On March 16, 1933, at the 67th meeting of the Conference, a draft convention was submitted by the United Kingdom delegation providing that "(Article 34) the High Contracting Parties accept the complete abolition of bombing from the air (except for police purposes) in certain outlying regions." In the discussion which followed this, Ambassador Gibson, the representative of the United States, stated that abolition of bombardment from the air "should be absolute, unqualified, and universal," and he spoke of the growing conviction that bombardment from the air "was a crime," and that there should be no exception. At the 77th meeting on June 8, 1933, the Conference voted "that the Draft Convention submitted by the United Kingdom delegation and accepted as a basis of discussion by a formal decision of the General Commission should be accepted as a basis of the future Convention. This acceptance would be without prejudice to amendments or proposals submitted before or during the second reading." Japan was opposed to the action, unless provision be made at the same time for abolition of aircraft carriers and prevention of the use of civil aircraft for military purposes in time of war.

Nothing further has been done by the League of Nations Conference with reference to abolition of aerial bombardment; and hence the question, as to its legality with reference to neutral ships remains, in 1935, entirely undiscussed and unsettled between the nations, just as it was left at The Hague in 1923.

Hence, it is foolish for international lawyers and statesmen to postpone, any longer, consideration of the proper use of belligerent aircraft with respect to neutral trade.)

Are nations so helpless that they must all wait to have the question at issue settled by "the practice of the next maritime war" (to use Admiral Rodgers' words)? Must neutrals wait until they are involved in all the frictions and resentments caused by belligerent operations in a war, before they seek to protect their rights? Can they make no attempt to obtain a pre-war agreement regulating the operation of belligerent aircraft? Must we wait until we get into trouble before attempting to solve international legal problems?

On April 27, 1921, Elihu Root said to the American Society of International Law: "It is obvious that we cannot go on assuming that the laws and customs of war on land and at sea which regulate the rights and duties of neutral Powers and persons in case of war retain the authority which we supposed them to possess in the month of July, 1914. . . . The question now is, how far do they exist?" If he then doubted the existence of law as to neutral rights in connection with war on land and at sea, how much less do there appear now to be any settled neutral rights in connection with war in the air?

If no prior agreement on this subject can be obtained, then it becomes of high importance that the United States shall not attempt, during the progress of any future war, to claim for its citizens neutral rights as against the operation of belligerent aircraft. For it is practically certain that, in the absence of previous international agreement, belligerents will use their aircraft against neutral vessels, in whatever manner they may find necessary to achieve stoppage of trade with the adversary, and if the United States shall insist on asserting and maintaining, during the war, any neutral claims as against such aircraft action, the United States will inevitably be brought into exactly the same situation into which circumstances led it with respect to unsettled rights of operation of submarines in the World War.

The time to try to keep out of trouble is before we get in. And the best way of trying to keep out of trouble is to join the other nations in every practicable move to avert the breaking out of trouble.<sup>1</sup>

<sup>1</sup> Since the above article was written, Professor Earl Willis Crecraft has published his *Freedom of the Seas* (1935), in Chapter 14 of which (entitled "Next the Airplane") he treats to some extent of the problem of aircraft and neutral trade (pp. 124-131) and says: "It is evident that, if another great maritime war should occur, and if aircraft should be used to destroy merchantmen carrying munitions, to enforce a blockade or to enforce a war zone, the same acute crisis would confront neutral nations that confronted them in 1915 and 1916. Any neutral which went through such bitter experiences with the submarine, ought to prepare to meet the challenge of the airship." See also *Sea Power in the Modern World* (1934), by Admiral Sir Herbert Richmond, K.C.B., pp. 113-116, reviewed *infra*, p. 359.

## THE POSITION OF ALIENS IN NATIONAL SOCIALIST PENAL LAW REFORM

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The draconic character of German National Socialist legislation on political crime has been brought forcibly to public attention by the recent activity of the People's Court (*Volksgericht*), which was established last year for the purpose of assuring a more effective repression of treason and espionage.<sup>1</sup> The subject is one of international concern, since the court has jurisdiction over aliens for acts committed abroad as well as upon German territory, and applies a law which is almost unparalleled at the present time in its severity and comprehensiveness. The safeguards commonly deemed essential to the protection of the accused are absent from the proceedings of the *Volksgericht*, which are secret as to indictment, investigation and trial.<sup>2</sup> There may have been adequate grounds for the recent execution of two German women and for the sentence of life imprisonment imposed upon a Polish national, on conviction of treason. They are not evident, however, from the brief, matter-of-fact statements which have been issued by the Ministry of Propaganda and Popular Enlightenment. It is now reported that an American citizen is being held for trial before the *Volksgericht* on a charge of treason, which is apparently based upon the fact that he had committed to writing his impressions as to the military character of the S.-A. and the S.-S.,—impressions which the most casual and inobservant tourist in Germany could scarcely fail to form.<sup>3</sup> Heretofore, foreigners whose presence has been deemed inimical to the interests of the Reich have been requested to leave the territory,<sup>4</sup> or, in some cases, they have been expelled.<sup>5</sup> It is not incon-

<sup>1</sup> *Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens*, Arts. III, IV, April 24, 1934, *Reichsgesetzblatt*, I, 341 (cited hereafter as Law of April 24, 1934). The *Volksgericht* was inaugurated on July 14, 1934.

<sup>2</sup> The provisions as to secrecy in proceedings involving political crimes were not introduced by the present Government. Sec. 173 of the *Gerichtsverfassungsgesetz*, as amended by the law of April 5, 1888 (*RGBl.* I, 133), provides that the courts may exclude publicity in all proceedings in which secrecy is required in the interests of public order, and, especially, of the security of the state. The decision is made public, but the grounds therefor may be suppressed in whole or in part (§ 174).

"Through this exclusion of publicity the first fundamental principle of law, that of the *lex certa*, is violated; for the question as to what is punishable is itself, thereby, made a secret." E. J. Gumbel, in 2 *Justiz* (1926-27), 86.

<sup>3</sup> *New York Times*, Jan. 30, 1935.

<sup>4</sup> As, for example, in the well-known "Panter incident." See *The London Times*, Oct. 27, 29, 30, and Nov. 8, 10, 1933.

<sup>5</sup> By the *Gesetz über Reichsverweisungen*, March 23, 1934 (*RGBl.* I, 213), "A foreigner may be expelled from the territory of the Reich. . . 3. If he acts or has acted in a manner

ceivable that the National Socialist Government may determine to initiate a more drastic policy, and to invoke the provisions of its penal legislation against foreigners, at least in cases in which they do not enjoy strong diplomatic protection. The threat has frequently been made, and legislation exists which, if enforced, would render impossible all foreign journalistic activity in Germany which does not conform to the official point of view. Such a discussion as the present is, indeed, made criminal by the Law of April 24, 1934, which provides that any person (whether an alien or a national, and whether his act is committed in Germany or abroad) <sup>6</sup> may be sentenced to imprisonment for a term of one to fifteen years <sup>7</sup> for intentionally making public statements concerning official announcements or proceedings in treason cases, without permission by the competent authorities.<sup>8</sup> It will readily be seen that foreign journalists are able to carry on their work in Germany only upon the assumption that the law is a *brutum fulmen*. It must be recalled, however, that the present government has not always shown consummate tact in avoiding incidents which compromise good international relations, and that its leaders, when once they have decided upon a policy, are apt to carry it into execution with brusqueness and despatch. It is scarcely an exaggeration to say that foreigners in Germany, whose interest or profession involve them in the study of political questions, have a sword of Damocles hanging over their heads.

The demand for the drastic repression of political crime is not a new one in Germany, but began in military and national circles soon after the promulgation of the *Reichsstrafgesetzbuch* in 1871. Under the Empire, enforcement of the law of treason and espionage was relatively mild. It became more

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inimical to the state, or if his sojourn in the country is likely to endanger the internal security of the Reich; 4. If his conduct is likely to endanger the relations of the Reich to foreign countries."

See Bernhard Wolff, "*Reichsreform des Ausweisungsrechts*," 26 *Archiv des öffentlichen Rechts* (1934), 1-40; and Dr. Schack, "*Die Reichsverweisung*," 64 *Juristische Wochenschrift* (1935), 96-97.

<sup>6</sup> See Art. III, 1 (b); and § 4, par. 2, No. 2, *Strafgesetzbuch* (1871).

<sup>7</sup> That is, to "*Gefängnis*." On the various degrees of punishment provided in the German penal law, see §§ 14-19, *StGB*.

<sup>8</sup> Sec. 92d: "Wer vorsätzlich über amtliche Ermittlungen oder Verfahren wegen eines in diesem Abschnitt bezeichneten Verbrechens oder Vergehens [Landesverrat] ohne Erlaubnis der zuständigen Behörde Mitteilungen in die Öffentlichkeit bringt, wird mit Gefängnis bestraft."

Sec. 3 of the *Verordnung zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung*, March 1, 1933 (*RGBl.* I, 135) provides: "Whoever intentionally makes or spreads an untrue or grossly misrepresented statement of a factual nature which is apt to prejudice gravely the interests of the Reich or of a German State, or the prestige of the Government of the Reich or of a German State, or of the parties or associations standing behind these governments, shall, in so far as a more severe penalty is not established in other provisions, be punished with imprisonment up to two years, and, if the statement is made or spread publicly, by imprisonment for not less than three months."

This provision applies to aliens only with respect to acts committed upon German territory.

rigorous during the period of the Republic as a result of the growth of internal subversive movements and the increase in foreign espionage consequent upon persistent reports of secret rearming. The *Reichsgericht* viewed with tolerance violations of the law on treason, when committed from "national" or "patriotic" motives, as, for example, through the formation of nationalist or monarchist military groups. On the other hand, it regarded as traitors those who denounced such illegal activities as being of a nature to provoke foreign intervention. The Treaty of Versailles and the provisions on disarmament therein contained were, and are, a part of German law.<sup>9</sup> The *Reichsgericht* held, nevertheless, that the right of national self-defense is inalienable; that the illegal military organizations, assuming that they existed,<sup>10</sup> were the only protection of a disarmed state; and that no German citizen could, in appealing to treaties and laws imposed upon his country by force, justify the communication of treasonable information to the "enemy."<sup>11</sup> The same principles are applicable at the present time, and, since the adoption of new legislation by the National Socialist Government, it is no longer necessary for the prosecution to admit that the treasonable revelations are, in fact, true,<sup>12</sup> or to prove that the information divulged was not previously known to foreign governments or to the general public.<sup>13</sup>

<sup>9</sup> *Gesetz über den Friedensbeschluss zwischen Deutschland und den alliierten und assoziierten Mächten*, July 16, 1919 (RGBl. I, 687); and Art. IV, *Reichsverfassung*.

<sup>10</sup> The *Reichsgericht*, which could not admit the truth of the charges of secret rearming, developed the doctrine that there is attempted treason if a person reveals false or incorrect information which, if true or correct, would be to the interest of the Reich to keep secret. See Klee, "Eine Lücke im Tatbestande des Landesverrats," 29 *Deutsche Juristen-Zeitung* (1924), 360-363.

<sup>11</sup> See, for example, the decisions of the *Reichsgericht* of March 27, 1924, 54 *Juristische Wochenschrift* (1924), 1531; and March 14, 1923, 62 *Entscheidungen in Strafsachen*, 65.

In 1923 the *Reichsgericht* condemned to six years of penal servitude, for diplomatic treason and receiving stolen goods, one Wandt, who had made public in Belgium certain documents purloined from the German archives and containing statements as to the activities of Flemish separatists during the German occupation. The court held "that through the betrayal of the documents the Belgian personalities with whom the German Government had entered into association during the war were at the same time betrayed. Should our Government at some time be in the position of having to make use of the aid of these men for carrying out its aims—which could easily happen in the event of a change in the present political situation—this would be rendered considerably more difficult by the betrayal." Summary by Oborniker, in 1 *Justiz* (1925-26), 320-321.

See Lothar Schücking, "Landesverrat und Friedensvertrag," 3 *ibid.* (1927-28), 509 ff.; and, for a thorough treatment, Hellmuth von Weöer, "Die Verbrechen gegen den Staat in der Rechtsprechung des Reichsgerichts," *Die Reichsgerichtspraxis im deutschen Rechtsleben*, V (1929).

<sup>12</sup> That is, in order to secure a conviction for consummated treason. See note 10, above. The law of April 24, 1934 (§ 90a, par. 2) provides that "whoever divulges information [*Gegenstände, Tatsachen oder Nachrichten*] which he knows to be false, falsified or untrue, and which would be state secrets if they were genuine or true, without indicating them to be false," is punishable with penal servitude (*Zuchthaus*).

<sup>13</sup> The same law provides (§ 90b, par. 1) that "whoever publicly makes known or discusses former state secrets, which were already known to the foreign governments from whom they

Pacifists, among whom might be counted some of the firmest supporters of the Republic, were thus punishable as traitors, while reactionary groups, pledged to its destruction, received the protection of the law on treason and espionage. The *Reichsgericht* also developed the law for the suppression of Communist agitation. When the National Socialists came into power they found at their disposal a well-stocked armory of legal weapons with which to combat their enemies. There remained only the tasks of filling certain gaps, of increasing the severity of penalties, and of applying the law in the spirit of the authoritarian state.<sup>14</sup>

National Socialism, which Adolf Hitler has defined as a "*Weltanschauung*," has also a *Rechtsanschauung* which demands the renovation of the existing law with the purpose of bringing it into harmony with the "nordic-German" legal consciousness. This reform, it is urged, requires the rejection of all legal principles or institutions which are derived from non-German, "non-Aryan" sources, and, especially, from the Roman law or from the liberal thought of the past two centuries.<sup>15</sup> The attempt has been made to justify the reforms which have been carried out or proposed as a return to original Germanic principles. Thus, crime is viewed as a breach of the *Treuepflicht*, of the loyalty owed to *der Führer*,<sup>16</sup> and the *Willensstrafrecht*, according to

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were to be kept secret, or which have already been made publicly known, and thereby endangers the welfare of the Reich shall be punished by imprisonment for not less than three months."

The above provisions are, with slight changes, taken from the *Verordnung gegen Verrat am deutschen Volke und hochverräterische Umtriebe*, Feb. 28, 1933, which was repealed by Art. VIII, No. 4, Law of April 24, 1934.

<sup>14</sup> The above subject is discussed more fully by the present writer in a paper read before the Grotius Society, June 14, 1934, on "International Law and German Legislation on Political Crime." Transactions of the Grotius Society (London, 1934).

<sup>15</sup> See Helmut Nicolai, *Die rassengesetzliche Rechtslehre* (Munich, 1932), and G. R. Schmeltzen, *Das Recht im nationalsozialistischen Weltbild* (Leipzig, 1934). For general discussions of the race theory in political and legal thought, L. Preuss, "*La théorie raciale et la doctrine politique du national-socialisme*," 41 *Revue générale de droit international public* (1934), 661-674; and "Germanic Law versus Roman Law in National Socialist Legal Theory," 16 *Journal of Comparative Legislation and International Law* (1934), 269-280.

<sup>16</sup> "Whoever violates the law of the state acts against the will of the Leader, acts against the Movement, against the notion of the state and against our *Weltanschauung*. He violates thereby the sacred duty of fidelity to the Leader, for loyalty signifies obedience. He thereby acts also against the popular community, which is filled with the spirit and will of the Leader and is embodied in them." General Göring, "*Die Rechtssicherheit als Grundlage der Volksgemeinschaft*," address before the Academy of German Law, Nov. 13, 1934, *Völkischer Beobachter*, Nov. 14, 1934. Also, H. D. Freiherr von Gemmingen, *Strafrecht im Geiste Adolf Hitlers* (Heidelberg, 1933), 16; and Hans Richter, in 55 *Reichsverwaltungsblatt und Preussisches Verwaltungsblatt* (1934), 494.

For an example of the attempt to express National Socialist ideas in old-Germanic language, see the following statement by Dr. Roland Freisler in the introduction to an official report on penal law reform: "According to the German conception, the dead man accuses the perjurer who approaches him through the bleeding openings of his wounds, for the murdered one shrieks for vengeance. And the inner justification of vengeance lies in the cry for

which the will of the actor and not the act itself is made punishable,<sup>17</sup> is regarded as the expression of the ancient Germanic conception of the freedom of the will, which is contrasted with the environmentalism of the sociological school and the economic determinism of the Marxists.<sup>18</sup>

It is not necessary, in order to understand the character of the National Socialist penal legislation, to resort to racial theories of the origin and validity of law. A nationalistic, authoritarian government, which has attained power after a long struggle, will naturally seek to render secure its position by erecting strong legal defenses against its opponents.<sup>19</sup> In National Socialist legend the defeat of Germany in the World War is attributed to the undermining of the national resistance through Marxist agitation behind the lines.<sup>20</sup> The present government is prepared, therefore, to resort to a policy of terrorization in order to suppress any manifestation of political dissent which might in the slightest degree endanger the internal or external security of the régime.<sup>21</sup> The totalitarian state demands a *Kampfrecht*, a law of struggle, and is satisfied with nothing less than the annihilation of its opponents.<sup>22</sup>

A succession of important statutes and ordinances which give practical effect to these principles has been enacted since January 30, 1933.<sup>23</sup> It is planned, moreover, to initiate a fundamental and thorough reform through the adoption of a new Penal Code based on National Socialist ideas. A voluminous literature has sprung up around the subject, and the Prussian

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expiation, for the expiation which the guilt of Oedipus, the guilt of the *Nibelungen*, which every guilt demands." *Das kommende deutsche Strafrecht, Allgemeiner Teil; Bericht über die Arbeit der amtlichen Strafrechtskommission* (Dr. Franz Gürtner, Reichsminister der Justiz, herausg., Berlin, 1934), 14. Cited hereafter as "Gürtner, Bericht."

<sup>17</sup> On this conception of penal law, as opposed to the *Erfolgsstrafrecht*, which emphasizes the result of the criminal act, see Freisler, "Willensstrafrecht: Versuch und Vollendung," in Gürtner, *Bericht*, 9-36; Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (Tübingen, 1934), 34 ff; Edmund Metzger, "Willensstrafrecht, Gefährdungsstrafrecht und Erfolgsstrafrecht," 39 *Deutsche Juristen-Zeitung* (1934), 97-103.

<sup>18</sup> For an historical sketch of the principal German theories of penal law, see Erik Wolf, *Krisis und Neubau der Strafrechtsreform* (Tübingen, 1933).

<sup>19</sup> On the relation between the character of the National Socialist State and that of its penal law, see J. M. Ritter, "Bemerkungen zum Wandel des politischen Deliktes und der Strafgesetze zum Schutze von Volk, Bewegung und Staat in Recht und Rechtspolitik," 63 *Juristische Wochenschrift* (1934), 2213-2225; and Dr. Strauss, "Die Erweiterung des Rechtsgüterschutzes im nationalsozialistischen Strafrecht," *Denkschrift des Zentralausschusses der Strafrechtsabteilung der Akademie für Deutsches Recht über die Grundzüge eines Allgemeinen Deutschen Strafrechts* (Berlin, 1934), 31-41. Cited hereafter as "Denkschrift."

<sup>20</sup> For a typical statement, Hitler, *Mein Kampf* (Munich, 12th ed. 1933), 775.

<sup>21</sup> "Our penal law must once more become penal law. The idea of retribution (*Vergeltungsgedanke*) must again become decisive, and the word 'terrorization' must again become, I might say, 'respectable' (*salonfähig*)." Heinrich Gerland, in 38 *Deutsche Juristen-Zeitung* (1933), 860. <sup>22</sup> See statement by Dr. Roland Freisler, in Gürtner, *Bericht*, 12.

<sup>23</sup> For a brief survey, see *Jahrbuch des Deutschen Rechts*, I. Bd., *Neue Folge* (1934), 66-79, 494-500, and 745-755.

Ministry of Justice,<sup>24</sup> the Reich Ministry of Justice<sup>25</sup> and the Academy of German Law<sup>26</sup> have issued reports in which the guiding principles of the future *Strafgesetzbuch* are set forth. In the meanwhile, the legislative provisions on treason and espionage, with which we are here primarily concerned, have been consolidated in the Law of April 24, 1934. This act not only contains important innovations, but also furnishes indications concerning the content of the code which is now in preparation.

German law makes a distinction between high treason (*Hochverrat*) and treason (*Landesverrat*), including under the former category offenses which endanger the constitutional<sup>27</sup> or territorial integrity of the state, and under the latter, crimes against its external security or its relations with other states. This distinction is preserved in the Law of April 24, 1934,<sup>28</sup> which divides acts of high treason into three classes: (1) offenses against the territory of the Reich; (2) offenses against the constitution of the Reich; and (3) coercion (*Nötigung*) of the higher authorities of the Reich in the exercise of their constitutional functions. It is provided (§ 80) that

Whoever undertakes by force or by threat of force to annex the territory of the Reich in whole or in part to a foreign state, or to separate from the Reich a territory belonging to the Reich, shall be punished with death.

Whoever undertakes by force or by threat of force to alter the constitution of the Reich shall be punished in like manner.

The following section is new, and provides the death penalty or penal servitude of not less than five years for anyone who undertakes to deprive the President,<sup>29</sup> the Chancellor, or any member of the Government of the Reich, of his constitutional powers, or, by force, threat of force, or crime, undertakes to hinder him in the exercise of his constitutional powers or to influence

<sup>24</sup> *Nationalsozialistisches Strafrecht: Denkschrift des Preussischen Justizministers* (Berlin, 1933). Cited hereafter as "*Preuss. Denkschrift*."

For commentaries, see Friedrich Schaffstein, "*Nationalsozialistisches; Gedanken zur Denkschrift des Preussischen Justizministers*," 53 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1933), 603-628; and E. S. Rappaport, "*Le futur code pénal du troisième Reich*," 11 *Revue internationale de droit pénal* (1934), 279-303.

<sup>25</sup> Gürtner, *Bericht*. Cited in full, note 16, above.

<sup>26</sup> *Denkschrift*. Cited in full, note 19, above.

<sup>27</sup> The constitutional order which is the object of protection in the law of high treason includes more than the formal text of the written constitution. The *Denkschrift* of the Prussian Minister of Justice suggests the following provision: "As high treason is to be punished with death the undertaking of the direct, forcible alteration (a) of the existing fundamental political, economic and social order of the national life. . . ." (p. 31.)

<sup>28</sup> This law replaces §§ 80-93 of the *Reichsstrafgesetzbuch* of 1871. For brief analyses, see Hans Richter, "*Die neuen Strafbestimmungen und Verfahrensvorschriften gegen Hoch- und Landesverrat*," 55 *Reichsverwaltungsblatt und Preussisches Verwaltungsblatt* (1934), 493-498; and 3 *Bulletin de la Commission Internationale Pénale et Pénitentiaire* (1934), 365-368.

<sup>29</sup> The offices of *Reichspräsident* and *Reichskanzler* are now united in the person of *der Führer*.

their exercise in a determined direction. It is now possible, therefore, to secure a conviction for high treason in the case of such offenses without the necessity of showing that the fundamental subversion of the constitution is intended.<sup>30</sup> A number of provisions with reference to preparatory acts (*Vorbereitungshandlungen*) follow. Treasonable conspiracy, entering into relations with a foreign government or misusing public authority for treasonable ends, and the recruiting or training of troops are punishable as above (§ 82). Public incitement to a treasonable undertaking (§ 83, par. 1) and any other acts preparatory thereto (§ 83, par. 2) are punishable by penal servitude from one to fifteen years or by imprisonment up to ten years. The latter provision is the "*Generalklausel*," which, it is urged, is essential to the effective enforcement of the law. Treasonable activity is capable of assuming so many guises that it is impossible to foresee them all and to provide for their punishment by means of the enumeration of specific offenses.<sup>31</sup> Four especially dangerous types of preparatory acts are specifically mentioned, and are made punishable by death or by penal servitude for not less than two years: (1) acts directed toward the establishment or maintenance of organizations with the purpose of preparing for treasonable undertakings (§ 83, par. 3, No. 1);<sup>32</sup> (2) acts which aim at rendering the *Reichswehr* or the police incapable of discharging their duties (§ 83, par. 3, No. 2); (3) mass-propaganda aiming at treasonable ends (§ 83, par. 3, No. 3); and (4) undertaking to introduce treasonable propaganda into the country (§ 83, par. 3, No. 4).<sup>33</sup> Whoever prints, distributes or holds ready for distribution a document which is treasonable under the above provisions may be punished with imprisonment for not less than one month, even though he may be ignorant of its content, provided that he could have ascertained its treasonable character by a careful examination (§ 85).<sup>34</sup>

The second part of the Law of April 14, 1934 (§§ 88-92) combines the scattered provisions on treason (*Landesverrat*) and espionage<sup>35</sup> which are found

<sup>30</sup> Sec. 5, No. 1, *Verordnung zum Schutze von Volk und Staat*, Feb. 28, 1933 (*RGBl.* I, 83), provides that anyone who shall undertake to kill the President or a member of the Government of the Reich or of a State, or who shall incite or conspire thereto, shall be punished with death or by penal servitude up to fifteen years, unless a more severe penalty is elsewhere provided.

<sup>31</sup> See Richter, *op. cit.*, 494.

<sup>32</sup> The *Gesetz gegen die Neubildung von Parteien*, July 14, 1933 (*RGBl.* I, 479), provides that the *N.S.D.A.P.* shall be the sole political party in Germany, and makes punishable by penal servitude to three years or by imprisonment to three years the attempt to maintain or to establish any other political party, provided that a more severe penalty is not established elsewhere. Treasonable intention need not be proved.

<sup>33</sup> See also the *Gesetz zur Gewährleistung des Rechtsfriedens*, Oct. 13, 1933 (*RGBl.* I, 723).

<sup>34</sup> In the case of all offenses under §§ 80-84, an unlimited fine may be added (§ 86). See the *Gesetz über die Einziehung kommunistischen Vermögens*, May 26, 1933 (*RGBl.* I, 293), and the *Gesetz über die Einziehung volks- und staatsfeindlichen Vermögens*, July 14, 1933 (*RGBl.* I, 479).

<sup>35</sup> The *Gesetz gegen den Verrat militärischer Geheimnisse*, June 3, 1914 (*RGBl.* I, 195), is repealed by Art. VIII, No. 1.

in previous enactments, strengthens their sanctions, and adds several new offenses. An undertaking to betray a state secret to a foreign government or its agents, or to make it publicly known, shall, if done with the intent of injuring the Reich, be punishable with death if the offender be a German, and with penal servitude for life if he be a foreigner (§§ 89, pars. 1-2, § 88, par. 2). An attempt to procure a state secret, with the intent to reveal it, is punishable with death or penal servitude for life (§ 90, par. 1).<sup>36</sup> State secrets are defined as writings, drawings, and other objects, facts or information which are to be kept secret from a foreign government in the interests of the Reich, and, especially, of the national defense (§ 88, par. 1). The conception is not clear, and the final decision as to what information is to be kept secret will rest, as it has heretofore, with the military authorities. This vagueness and arbitrariness once led von Liszt to remark that "the notion of the military secret is a secret to the experts themselves."<sup>37</sup> The provisions of this chapter are a trap to the unwary foreigner, who may not be conscious of the fact that he has violated the law until he has been convicted. The doctrine of the "relative secret," according to which the revealing of information generally known within a given circle of persons or in a given locality may constitute espionage if it be made public beyond these limits, is especially dangerous. Natural geographical data, such as the configuration of a coast, may be regarded as military secrets on the theory that they may, in some future contingency, have a bearing upon the national defense.<sup>38</sup>

It will be noted that the above law provides for the punishment of an "undertaking" (*Unternehmen*) to commit treason. This term includes both the consummated act and attempt (*Vollendung und Versuch*),<sup>39</sup> and is an application of the *Willensstrafrecht*, according to which the criminal will, and not the result of the criminal action, is decisive. If the penal law is to be effective, the line of defense of the state must be pushed forward to the point where it can prevent the anticipated injury. The criminal will, therefore, is made punishable as soon as it manifests itself in action, and the entire act, from the beginning of its execution to its consummation, is viewed as a single offense.<sup>40</sup>

Before the adoption of the Law of April 24, 1934, German penal law was primarily territorial and extended extraterritorially to aliens only with

<sup>36</sup> If the act cannot lead to any danger to the Reich, the penalty is penal servitude for life or for not less than five years in the case of offenses against § 89, and penal servitude to fifteen years in the case of § 90.

See the other provisions of this law cited in notes 8, 12 and 13, above.

<sup>37</sup> 291 *Verhandlungen des Reichstags, XIII. Legislaturperiode, 1912/14*, 5991.

<sup>38</sup> *Reichsgericht*, May 12/19, 1884, 10 *Entscheidungen in Strafsachen*, 420; Dec. 16, 1893, 25 *ibid.*, 45. On the entire subject of military secrets, Freiesleben, "Einzelne Fragen aus dem Gebiete des Landesverrats und der Spionage," 45 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1924), 237-262.

<sup>39</sup> This is specifically provided in § 87.

<sup>40</sup> Roland Freisler, in *Denkschrift*, 13; also, *Preuss. Denkschrift*, 112-113.

respect to acts of high treason.<sup>41</sup> There had, however, been an insistent demand that the law on treason (*Landesverrat*) and espionage be applied to all acts directed against the internal or external security of the Reich, even though they be committed by foreigners abroad.<sup>42</sup> The project which was published in 1927 contained such a provision,<sup>43</sup> and the Prussian Ministry of Justice in 1933 recommended the following text for incorporation in the future National Socialist code:

The penal laws of the German Reich, independently of the law of the place of the act, apply also to acts committed abroad whereby laws established for the protection of the German people and State are violated, so far as it does not otherwise follow from the sense of the law.<sup>44</sup>

The Law of April 24, 1934, although somewhat less inclusive, amends Section 4 of the Penal Code to read as follows:

As a rule, no prosecution takes place on account of a criminal offense (*Verbrechen und Vergehungen*) committed abroad.

However, the following may be prosecuted under the penal laws of the German Reich:

1. A German or an alien who has committed an act of high treason against the German Reich. . . .

2. A German or an alien who has committed a treasonable (*landesverräterische*) action against the German Reich or an attack against the President of the Reich. . . .<sup>45</sup>

The consequences of such a provision may readily be seen. It purports to give to the German law on political crime a universal application. Acts committed by foreigners abroad are incriminated even though they may be

<sup>41</sup> Sec. 4, par. 2, No. 1, *StGB.* (1871). See Heinrich Gerland, "Internationales Strafrecht nach den Bestimmungen des deutschen Strafgesetzbuchs und den Vorschlägen des Entwurfs," 6 *Zeitschrift für ausländisches- und internationales Privatrecht* (1932), 177-184.

<sup>42</sup> See, for example, *Verhandlungen des Reichstags, VIII. Legislaturperiode 1892/93, II. Anlageband, Drucksache Nr. 171*; 305 *ibid.*, XIII. Legislaturperiode 1912/14, Drucksache Nr. 1640.

<sup>43</sup> *Entwurf eines Allgemeinen Deutschen Strafgesetzbuchs, Reichstag, III. 1924/27, Drucksache, Nr. 3390.*

<sup>44</sup> *Preuss. Denkschrift*, 128. A note adds that "Nationals and foreigners who, for example, carry on atrocity-propaganda abroad against Germany are to be punished, but not, on the other hand, for example, an alien who marries a Jewess." This note refers to the recommendations of this same *Denkschrift* that marriage or intercourse between a German and a member of an alien "*Blutgemeinschaft*" be punishable as "treason to the race" (*Rasseverrat*) (*ibid.*, 47-49). One of the collaborators in the *Denkschrift* of the Academy of German law finds that this provision is "too narrow," and suggests that ridiculing the consciousness of race (*Rassenempfinden*) be punishable (37).

<sup>45</sup> Art. VIII. Prosecution of an alien for an extraterritorial offense is initiated only with the authorization of the Minister of Justice. Art. VIII, 1 (c).

The above provisions will, no doubt, be carried over into the future Penal Code. See Dr. Reimer, "Räumliche Geltung des künftigen Strafgesetzes," *Gürtner, Bericht*, 140-146.

legal by the *lex loci*.<sup>46</sup> The claim to jurisdiction upon the basis of the principle of state protection may appear, to Anglo-American lawyers at least, an excessive one. As Professor Brierly has remarked, "there seems to be a certain anomaly in submitting to a non-territorial jurisdiction the very class of crimes which states by common consent exclude from extradition."<sup>47</sup> In passing judgment upon the international legality of such claims to jurisdiction it must be recalled, however, that similar provisions are found in the penal legislation of practically all states which do not base their legal systems upon the common law.<sup>48</sup> That the principle of state protection may be in violation of international law does not seem to have occurred to German writers, who, when they mention the question at all, generally justify the principle as a manifestation of the *Kompetenz-Kompetenz* of the state, that is, of its exclusive and unlimited right to determine the extent of its own penal competence.<sup>49, 50</sup>

As stated above, the *Volksgesicht* has original and final jurisdiction in cases of high treason and treason under the Law of April 24, 1934.<sup>51</sup> Five members sit during trial, but only the president and one additional member need

<sup>46</sup> An extreme provision is found in § 92a, Law of April 24, 1934: "Whoever in time of war or threat of war against the Reich does not fulfill a contract with an authority relating to the requirements of the national defense of the Reich or its allies, or fulfills it in such a manner as to frustrate or endanger the purpose of its performance, shall be punished with imprisonment for not less than one year. The same applies in times of general need with respect to a contract with an authority for the delivery or conveyance of provisions or other commodities necessary for the removal of the common need." There is a similar provision in the Italian Penal Code (1930), Arts. 251-252.

<sup>47</sup> "Report on Extraterritorial Crime," League of Nations Document, 1926. V. 7, p. 3.

<sup>48</sup> Protective legislation in some countries is even more extreme than the German. The Polish Penal Code of 1932, for example, provides (Art. 104) for the punishment of anyone who "in time of war or threat of war, for the purpose of influencing the spirit of resistance of the population, spreads information of a nature to weaken this spirit of resistance." Art. 265, Italian Penal Code (1930), is similar.

<sup>49</sup> "The legislator is absolutely sovereign in the determination of the circle of persons who are to be bound by his legal principles. He can direct his commands to the entire world, but can also confine its actual sphere of application more narrowly." Dr. Schoetensack, *Denkschrift*, 62. See also, Karl Binding, *Handbuch des Strafrechts*, I (Leipzig, 1885), 374.

<sup>50</sup> Another law of international interest is the *Gesetz über den Widerruf von Einbürgerungen und die Aberkennung der deutschen Staatsangehörigkeit*, July 14, 1933 (*RGBl.* I, 480), which provides that nationality may be withdrawn from German citizens residing abroad "if they have by their conduct, contrary to the duty of fidelity to the Reich and the people, injured German interests." For detailed discussion, see L. Preuss, "International Law and Deprivation of Nationality," 23 *Georgetown Law Journal* (1935), 250-276.

<sup>51</sup> Art. III, § 1 (1). Cases of lesser importance, involving preparatory acts (§§ 82, and 90b-e) may be turned over to the *Oberlandesgerichte* for trial and decision. The Special Courts (*Sondergerichte*) established by the *Verordnung über die Bildung von Sondergerichten*, March 21, 1933 (*RGBl.* I, 136), are competent in less important political cases arising under the *Verordnung zum Schutz von Volk und Staat*, Feb. 28, 1933 (*RGBl.* I, 83), and the *Verordnung zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung*, March 21, 1933 (*RGBl.* I, 135).

possess the qualifications for judicial office.<sup>52</sup> Ostensibly, the *Volksgericht* was created in order to lighten the work of the *Reichsgericht* and to expedite the handling of political cases. Through the appointment of lay members, it is said, the court will gain the advantage of "special expertness in defense against efforts inimical to the state."<sup>53</sup> In fact, the establishment of the *Volksgericht* can be traced directly to the acquittal by the *Reichsgericht* of Torgler and the Bulgarian defendants in the Reichstag fire trial, and to the repercussions which the proceedings in that case had upon world opinion.<sup>54</sup>

Under the totalitarian state the principle of judicial independence is weakened, if not entirely destroyed.<sup>55</sup> Another safeguard of the individual has disappeared from German legal practice with the violation of the maxim *nullum crimen, nulla poena sine lege*, which, incorporated in the legislation of practically every modern state, may be regarded as one of the "general principles of law recognized by civilized nations." Van der Lubbe, the principal defendant in the Reichstag fire case, was convicted and executed under a retroactive statute which imposed the death penalty for an act which, when it was committed, was punishable with imprisonment for ten years to life.<sup>56</sup> The principle of the non-retroactivity of the criminal law stands at the beginning of the *Reichsstrafgesetzbuch*,<sup>57</sup> and is among the fundamental rights guaranteed by the Weimar Constitution.<sup>58</sup> That it is a product of the liberal, humanitarian thought of the *Aufklärungszeit* apparently suffices to condemn it, however, in National Socialist eyes.<sup>59</sup> It is now proposed further

<sup>52</sup> Art. III, § 1 (2). The members are appointed by the Chancellor upon the recommendation of the Minister of Justice. (Art. III, § 2).

The Italian Tribunal for the Defense of the State probably served as a model for the *Volksgericht*. *Provvedimenti per la difesa dello Stato*, Art. 7, Nov. 25, 1926, *Gazzetta Ufficiale*, Dec. 6, 1926.

<sup>53</sup> Richter, *op. cit.*, 497.

<sup>54</sup> See the comment in the *Völkischer Beobachter* (Dec. 24/25/26, 1933) on "das Fehlurteil von Leipzig," and the article "Was Lehrt der Leipziger Prozess," *ibid.*, Jan. 11, 1934.

<sup>55</sup> See Heinrich Lange, "Justizreform und deutscher Richter," *Deutscher Juristentag*, 1933 (Berlin, 1933), 181-189; and Lothar Schöne, "Richter und Rechtspflege im neuen Staat," 25 *Archiv des öffentlichen Rechts* (1934), 265-290, for discussions of the position of the judiciary.

<sup>56</sup> Sec. 5 of the *Verordnung zum Schutze von Volk und Staat*, Feb. 28, 1933 (*RGBl.* I, 83), changed the penalty for arson from life imprisonment (§ 307, *StGB.*) to death, and § 1, *Gesetz über Verhängung und Vollzug der Todesstrafe*, March 29, 1933 (*EGBl.* I, 151), made the penalty retroactive for acts committed between Jan. 31 and Feb. 23, 1933.

See Van Hamel, "The 'Van der Lubbe Case' and Diplomatic Protection of Citizens Abroad," 19 *Iowa Law Review* (1933-34), 237-243.

<sup>57</sup> Sec. 2, par. 1: "An act can be visited with a penalty only if the penalty was determined by law before the act was committed."

<sup>58</sup> Art. 116.

<sup>59</sup> For example, the *Declaration des droits de l'homme et du citoyen* of June 23, 1793, provides (§ 14): Nul ne doit être jugé et puni qu'après avoir été entendu ou légalement appelé, et qu'en vertu d'une loi promulguée antérieurement au délit. La loi qui punirait des délits commis avant qu'elle existât serait une tyrannie; l'effet rétroactif donné à la loi serait un crime."

See Heinrich Klee, "Strafe ohne geschriebenes Gesetz," 39 *Deutsche Juristen-Zeitung* (1934), 639-643; and Dr. Matzke, "Was bedeutet die Überwindung der liberalistisch-weltanschaulichen Stellung des Richters zum Strafrecht," 63 *Juristische Wochenschrift* (1934), 1612 ff.

to weaken this guarantee, even in the absence of positive legislative action, through permitting the courts to resort to the use of analogy in the punishment of offenses not expressly made criminal by the written law. The Penal Law Committee of the Reich Ministry of Justice proposes the following text for inclusion in the future code:

If the act is not expressly declared to be punishable, but if a like act is threatened with a penalty in a law, this law is to be applied if the idea of law at the basis thereof and the sound conception of the people demands punishment.<sup>60</sup>

The maxim *nulla poena sine lege* is intended as a protection to the individual against judicial arbitrariness, but, the *Denkschrift* of the Prussian Ministry of Justice naively states, "such protection is not needed against a judiciary rooted in the *Volksleben*, such as the old-Germanic period knew and as it shall again come to life in the Third Reich."<sup>61</sup> Law, in the National Socialist conception, is not created by statute, but is the expression of the German legal conscience. The state cannot create it arbitrarily, but can only give it the sanction of its coercive authority.<sup>62</sup> In an oft-quoted statement of Alfred Rosenberg, "Law is what the Aryan man deems to be right; legal wrong is what he rejects."<sup>63</sup> What protection has the luckless foreigner whose non-Aryan soul can afford him no guidance along the paths of National Socialist law and justice? The problems which are raised by these tendencies in German legal development are not merely theoretical and academic, as may be seen by reference to the "blood purge" of June 30, 1934. This act of *Notwehr* was defended by Adolf Hitler in the following words: "In that hour I was responsible for the fate of the German nation and was, therefore, the supreme judge of the German people." The methods adopted in the stamping out of the Roehna "revolt" were not illegal, Carl Schmitt has declared, but were, "in truth, genuine jurisdiction." They were not a violation of justice, but were "the highest justice. . . . The judicial authority of the Leader springs from the same legal source as all law of the people. In the highest need the highest law holds good. . . . All law derives from the law of life of the people. Every law of the state flows from the same source."<sup>64</sup>

In the above survey of recent German law and practice with reference to political crime, the implications for international law have been suggested, and not detailed. Numerous questions relating to diplomatic protection of nationals, to denial of justice and to the penal competence of states arise out of the legislation which has been discussed, and may become of grave inter-

<sup>60</sup> Gürtner, *Bericht*, 132.

<sup>61</sup> *Preuss. Denkschrift*, 116.

<sup>62</sup> Nicolai, *Die Rassenrechtliche Rechtslehre*, 32-33.

<sup>63</sup> 2 *Deutsches Recht* (1934), 233. The emergency measures taken by the Government from June 30 to July 2, 1934, were ratified by the *Gesetz über Massnahmen der Notwehr*, July 3, 1934 (*RGBl.* I, 529).

<sup>64</sup> "Der Führer schützt das Recht," 39 *Deutsche Juristen-Zeitung* (1934), 947. Also, "Nationalsozialismus und Rechtsstaat," 63 *Juristische Wochenschrift* (1934), 715-718.

national concern should the present Government resolve to extend its vigorous enforcement policy to aliens. Heretofore, it has shown considerable discretion in this respect, but there has been no lack of incidents, such as the Reichstag fire case, which show that the position of the alien before the German law is a precarious one. The present attitude of the National Socialist Government is, no doubt, determined by its desire to avoid international controversies which might further embitter its relations with other states. There is no assurance that it will remain unchanged. No one who has followed the course of the National Socialist movement will be surprised by any turn it may take.

## IMPLIED RESOLUTIVE CONDITIONS IN TREATIES <sup>1</sup>

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### I

The doctrine of the *clausula rebus sic stantibus* is the familiar rubric under which are classified various materials bearing on the revision or termination of treaties. Much that the phrase connotes proves on examination to be too mischievous or vague for serious consideration. Yet there remains "a legal residuum," in Dr. Lauterpacht's phrase, "which, although of a limited compass, is capable of application by a judicial tribunal."<sup>2</sup> English jurists have suggested, somewhat cautiously, that a discussion of the implied clause might be illuminated by an examination of the principle of frustration in the private law of contracts.<sup>3</sup> And an analogy is also suggested between obsolescent treaties and restrictive covenants which, because of an essential change in circumstances, equity will no longer enforce. The matter is of such contemporary importance that international law cannot afford to leave unexamined any juristic material which promises to be suggestive. And if in the end the conclusion is reached that the principle of *rebus sic stantibus* can have only the most limited application to so-called obsolete treaties, this result will be none the less significant in clarifying the true nature of the problem.

Now it must be admitted at once that analogies drawn from private law are only partially applicable to inter-state relations, and it may be useful at the start to say what is conceived to be the possible significance of projecting a common law doctrine (frustration) and an equitable principle (as to the en-

<sup>1</sup> The Havana Convention on Treaties (4 Hudson, International Legislation, 2378) contains a number of provisions relative to subject of this article. That convention, however, presents such a variety of problems that it is reserved for separate consideration.

<sup>2</sup> The Function of Law in the International Community, p. 273.

<sup>3</sup> Brierly, "Some Considerations on the Obsolescence of Treaties," 11 Transactions of the Grotius Society (1926), 11, and The Law of Nations, p. 168 ff; Lauterpacht, *op. cit.*, 272 ff; McNair, War-Time Impossibility of Performance of Contract, 35 L. Q. R. 84 (1919), and *La Terminaison et la dissolution des traités*, 22 *Recueil des Cours, Académie de Droit International de la Haye* (1928), 463, 467 ff; Sir John Fischer Williams, "The Permanence of Treaties," this JOURNAL, Vol. XXII (1928), p. 89 ff, and Chapters on Current International Law and the League of Nations, p. 86 ff. Professor Garner discusses the same subject in "Revision of Treaties and the Doctrine of *Rebus sic Stantibus*," 19 Iowa Law Rev. (1934), 312. Dr. Chesney Hill has recently published a very able monograph on *The Doctrine of 'Rebus sic Stantibus' in International Law*, 9 University of Missouri Studies, No. 3 (1934).

Interesting analogies might be drawn from the law of Rome, modern systems of civil law, and the law of the American States. The present article resorts only to the law of England.

forcement of restrictive covenants) upon the plane of international law. Putting the case at its highest, one might seek to deduce one of those general principles of law which, under Article 38(3) of its Statute,<sup>4</sup> the Permanent Court of International Justice is to apply in controversies between states. This would involve an extensive comparative study, while the present inquiry is confined to materials drawn from English Law.

Appraising the method of private law analogy at its lowest, it might be contended that what one finds is only a superficial or accidental similarity to international situations, too unsubstantial to afford any guidance to a court of law. Appeal to analogy often tends to obscure realities, and smacks of the "proofs" of medieval scholasticism. For the purpose of the present discussion, an intermediate position is assumed. Whatever general principles (within the meaning of Article 38(3)) might emerge from an exhaustive comparative study, the most that could here be hoped for would be to derive from a single mature system of municipal law some considerations which might be persuasive in the judicial interpretation of treaties. The disparity between a State and a person of private law may be great: so too is that between a natural person and a corporation. If, none the less, there is a certain uniformity to the idea of an obligation based on convention, whoever the parties and whatever the legal system within which it arises, then such an inquiry as the present cannot be said at the outset to be wholly misconceived.<sup>5</sup> More than this. It is sometimes suggested that the Permanent Court, by invoking the doctrine of *rebus sic stantibus*, might effect a readaptation of treaties referred to it for interpretation. Comparison with municipal jurisprudence may serve as a guide to indicate how great a degree of elasticity can properly be attained in construing a convention. From the point where positive law is made to serve the interests of justice, we slip by degrees to the point where there is justice without law. How far may a court venture beyond a strictly literal system of interpretation without becoming subverted from its judicial function?

<sup>4</sup> The court shall apply: . . . (3) The general principles of law recognized by civilized nations."

<sup>5</sup> "[In the construction of treaties] it cannot be said that guidance is wanting. Apart from the technical effect of particular terms in this or that system, the main principles of interpretation are common to all civilized law, and the resources of jurisprudence and of historical criticism are no less open to arbitrators than to any other serious inquirer." Sir Frederick Pollock, 35 L. Q. R. (1919), 320, 328.

Cf. Prof. Le Fur's notes on the *Philosophie du droit international*, 28 *Rev. gén. de dr. int. public* (1921), 565, 587.

The remarks of Despagne are particularly pertinent: "Le caractère de contrats qu'il faut reconnaître aux traités publics permet de leur appliquer certains des modes d'extinction que le Droit privé établit pour les conventions entre particuliers; mais ce sont seulement ceux qui dérivent de la nature même des choses et que le législateur consacre plutôt qu'il ne les crée; ceux qui, au contraire, impliquent une intervention directe de la loi ne sont pas applicables dans les rapports internationaux, faute d'un législateur suprême pour les imposer aux États." *Cours de droit international public*, 4th ed., sec. 453.

## II

We come then to consider what the doctrine of frustration is, and what light it may throw on the interpretation of treaties.

Perhaps the broadest statement is that which Brett, J., formulated as the *ratio* of his judgment in *Jackson v. Union Marine Insurance Co.*:<sup>6</sup>

where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.

Earl Loreburn's formulation ran thus:<sup>7</sup>

When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule, it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

This principle was not an early development in the law of contract. For while a legal system is relatively immature, it will be characterized by hard law. In *Paradine v. Jane*<sup>8</sup> the plaintiff brought an action of debt for arrears of rent due on a lease. The defendant pleaded "that a certain German prince, by name Prince Rupert, an alien born, enemy of the King and kingdom, had invaded the realm with a hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession." The plea was held insufficient, and for two centuries thereafter when alleged impossibility was set up as a defence to an action for

<sup>6</sup> (1873) L. R. 8 C. P. 572, at 581; affirmed in the Exch. Ch., (1874) L. R. 10 C. P. 125. McCardie, J., the last judge in the world to restrain the growth of the law, observed that "if these words of Brett J. are to be applied to their widest extent they may well effect a revolution in contract law." *Blackburn v. Bobbin Co. v. T. W. Allen & Sons*, [1918] 1 K. B. 540, at 544.

<sup>7</sup> *F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397, at 403.

<sup>8</sup> (1647), Aleyn 26 (K. B.). Followed recently in *Redmond v. Dainton* [1920], 2 K. B. 256, where leased premises had been struck by a bomb from a German airplane, and the covenant to repair was enforced.

breach of covenant it would be disposed of summarily by a syllogistic demonstration that the defendant was bound under a purely literal construction of the covenant.<sup>9</sup>

The point of departure toward a more supple system of interpretation is to be found in the opinion of that very great judge, Blackburn, J., in *Taylor v. Caldwell*, in 1863.<sup>10</sup> The defendants had agreed to let to the plaintiffs a music hall, on four named days, for the purpose of giving concerts therein. Before the first of these days, the hall was destroyed by fire, and an action was brought to recover damages in respect of defendants' failure to perform their contract. In holding that both parties were excused from performance, Blackburn, J., said:

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthen-some or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish in principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

The doctrine of frustration has had a peculiar development in contracts of charter and affreightment. Suppose the parties have contracted for a mercantile adventure, and an unforeseen delay supervenes of such duration that the venture contemplated cannot be carried out. It might be said that the express terms of the contract would still be possible of performance when the delay had ceased. But the courts have interpreted the obligation from the

<sup>9</sup> Lord Kenyon, in *Bullock v. Dommit* (1796), 6 T. R. 650, and *Company of Proprietors . . . v. Pritchard* (1796), 6 T. R. 750. When Kenyon succeeded Mansfield, the movement to rationalize English law came to an end. Lord Ellenborough, the next Chief Justice of the King's Bench, took a similarly strict view: *Atkinson v. Ritchie* (1809), 10 East 530; *Barker v. Hodgson* (1814), 3 M. & S. 267. The case last cited, and *Spence v. Chodwick* (1847), 10 Q. B. 517, decided that impossibility of performance attributable to the law of a foreign country constituted no defence in an English court. The judgments would probably be otherwise today: [1920] 2 K. B. 291, 297, 303. <sup>10</sup> 3 B. & S. 826 (Q. B.).

point of view of what is practical in a commercial sense, that is, in the spirit in which the contracting parties came together.<sup>11</sup> In such a case the contract has become impossible of performance, but in a special sense: the contract which could be performed only at a time unreasonably deferred would be a different contract from that to which the parties agreed. To compel a literal carrying out of the words which they subscribed would be in effect to impose a new contract upon them.

The leading case of *Jackson v. Union Marine Insurance Co.* went on the same principle.<sup>12</sup> A ship owner was suing on an insurance of chartered freight, and the underwriter resisted the claim on the ground that the charter-party had remained in force notwithstanding the ship had gone on the rocks, and that the plaintiff should therefore look to the charterer for performance or damages. The facts were these: By the charter-party the ship was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, there to load a cargo of iron rails for San Francisco. The ship left Liverpool on January 2, and on the 4th, before arriving at Newport, went on the rocks. She was got off by February 18 and sent for repairs which would take until the end of August. On February 15 the charterer threw up the contract, and hired another vessel. The question was whether there had been a termination of the contract and a consequent loss of freight, or whether, on the contrary, the charterers had not been entitled to treat the contract as dissolved. The Court of Common Pleas held, Bovill, C. J., dissenting, that the former was the case, on the ground stated by Brett, J., in the passage already quoted.<sup>13</sup> On appeal to the Exchequer Chamber, the judgment for the shipowner was affirmed. Cleasby, B., dissenting, started from the proposition that *expressum facit cessare tacitum*. The ship was to proceed with all convenient speed, dangers and accidents of the seas excepted: these dangers being expressly contemplated, there was no ground for implying a resolute condition. There was no engagement that the ship should arrive by any particular day, and when repaired it was entitled to demand the cargo. Bramwell, B., for the majority, thought that beside the express condition that the ship arrive with all convenient speed, there was a further condition implied, that at all events she should arrive within a reasonable time. Did this implied condition disregard the express reference to the perils of the sea? What was the effect of those words? "I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by de-

<sup>11</sup> Cf. the remarks of Maule, J., in *Moss v. Smith* (1850), 9 C. B. 94, 103, approved by Lord Blackburn in *Dahl v. Nelson, Donkin & Co.* (1881), 6 A. C. 38, 52: "It may be physically possible to repair the ship, but at an enormous cost: and there the loss would be total; for in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

<sup>12</sup> (1873), L. R. 8 C. P. 572; aff. (1874), L. R. 10 C. P. 125 (Ex. Ch.). Cf. *Geipel v. Smith* (1872), L. R. 7 Q. B. 404.

<sup>13</sup> *Supra*, p. 221.

fault of neither." To have performed the contract under the altered conditions would have involved a wholly different voyage from that contemplated—"as different," said Bramwell, B., "as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage." The result of these cases was subsequently stated by Lord Blackburn in this form:<sup>14</sup> "a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and so long as to make it unreasonable to require the parties to go on with the adventure, entitles either of them, at least while the contract was executory,<sup>15</sup> to consider it at an end."

### III

It is only in the present century that these rules as to contracts *de certo corpore* and charter-parties were fused to form a broad principle applicable to the construction of contracts generally. In *Nickoll & Knight v. Ashton, Eldridge & Co.*,<sup>16</sup> the defendants had contracted in October to sell the plaintiffs a cargo of cotton seed to be shipped per steamer *Orlando* during January. A clause provided that "in case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." In December the *Orlando*, without any default of the defendants, stranded, and was so much damaged that her arrival at the port of shipment during January was rendered impossible. The sellers regarded the contract as terminated, while the buyers (since the price of cotton seed was rising) argued from the clause of exceptions that further conditions of like nature were not to be read in by implication. The judges differed as to whether the principle of *Taylor v. Caldwell* should be extended to a case where the supervening impossibility affected not the specific subject-matter of the contract, but a thing collateral to, though expressly named in, the contract. The wider view prevailed, "for," said A. L. Smith, M. R., "from the beginning, the parties must have known that the performance of the contract would become impossible unless the particular thing specified, that is, the steamship *Orlando*, continued to exist as a cargo-carrying ship down to and during the month of January."

Shortly afterwards the so-called Coronation Cases<sup>17</sup> made it necessary for the courts to test the principle by various sets of fact. The coronation of Edward VII was originally set for June 27, 1902, and on the footing that cer-

<sup>14</sup> *Dahl v. Nelson, Donkin & Co.* (1881), 6 A. C. 38, 53.

<sup>15</sup> It is now clear that the contract need not be executory for the doctrine of frustration to be invoked: *Bensaude v. Thames and Mersey Marine Ins. Co.* [1897] A. C. 609, affirming [1897] 1 Q. B. 29; *Noble's Explosives Co. v. Jenkins and Co.* [1896] 2 Q. B. 326; *Embiricos v. Sydney Reid & Co.* [1914] 3 K. B. 45.      <sup>16</sup> [1900] 2 Q. B. 298, [1901] 2 K. B. 126.

<sup>17</sup> *Elliott v. Crutchley*, [1903] 2 K. B. 476, [1904] 1 K. B. 565; *Herne Bay Steamboat Co. v. Hutton*, [1903] 2 K. B. 683, [1906] A. C. 7; *Henry v. Krell*, (1902) 18 T. L. R. 823, [1903] 2 K. B. 740; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756; *Blakeley v. Muller*, [1903] 2 K. B. 760 n; *Chandler v. Webster*, [1904] 1 K. B. 493.

tain processions and reviews would then take place various contracts were entered into, *e.g.*, to secure points of vantage for witnessing the ceremonies. The illness of the King caused the arrangements to be postponed, and the courts were called upon to decide what was the position of the contracting parties. In *Krell's Case* the defendant had agreed in writing to hire the plaintiff's flat in Pall Mall for June 26 and 27 at £75, paying £25 down. He declined to complete the payment, and counterclaimed for his deposit. The contract contained no express reference to the purpose of the hiring, but it was not disputed that the defendant had been attracted by plaintiff's announcement that he had to let windows from which to view the processions. In the principal judgment by Vaughan Williams, L. J., it was held that although the happening of the processions was not expressly mentioned either as a condition or as the object of the contract, yet in the contemplation of both parties it was the foundation on which they had come together. The Court of Appeal, therefore, inferred from the circumstances a resolute condition, and as the event turned out the contract was determined and the parties were left where the event found them.

Over against this is the *Herne Steamboat Case*,<sup>18</sup> decided five days earlier. The defendant had contracted to have plaintiffs' ship "at his disposal" on June 28 "for the purpose of viewing the naval review and for a day's cruise round the fleet; also on June 29 for similar purposes." The Court of Appeal held that the cancellation of the naval review did not amount to frustration of the contract. Defendant's purpose in making the bargain did not amount to the foundation of the contract. It was like hiring a cab to go to the races; if the races were postponed the fare would still be due. There was not even a total failure of defendant's purpose, for the fleet had remained at anchor and the cruise of observation had still been feasible.

However the sets of facts may tend to run together, there is in principle a clear distinction between the case where *A* contracts with *B* knowing the purpose which *B* has in mind, and that where *A* and *B* come together on the basis of a common tacit assumption which later proves to have been mistaken. In the former case *B* may be disappointed, but *A* gets out of the contract precisely the advantage he bargained for, and moreover furnishes precisely what he undertook to furnish. In the latter both prove to have been mistaken, and if *A* were allowed to recover it might be said to be on the footing of a contract to which neither *A* nor *B* had given assent.

So the matter stood until the commercial dislocation incident to the World War raised the problem in a variety of new aspects. In *Horlock v. Beal*,<sup>19</sup> a British ship, lying at Hamburg when war broke out, had been detained and the crew imprisoned. Plaintiff sued as allottee of the wages due to a member of the crew. Did the contract of service persist in spite of the detention and imprisonment? The House of Lords held in the negative. As Lord Loreburn summarized his conclusion,

<sup>18</sup> [1903] 2 K. B. 683.

<sup>19</sup> [1916] 1 A. C. 486.

I think it is an implied term of this service, subject to any special law affecting seamen, that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure.

When the Admiralty would requisition a chartered vessel the owners and the charterers would assume opposing positions, respectively contending and denying that the requisition put an end to their contract, according as the compensation offered by the Admiralty was greater or less than that which the owners had been receiving from the charterers. Thus in the *Tamplin Case*<sup>20</sup> the owners had let a tanker on a sixty months' time charter. The charter-party contained an exception, *inter alia*, of restraints of princes, and, moreover, the charterers had the liberty of sub-letting on Admiralty or other service. While the charter-party had almost three years to run the Admiralty requisitioned the ship and used it for a transport. The owners naturally sought to get rid of a contract at the 1912 rate of hire, but the majority of the House of Lords held that there had been no frustration. Their Lordships were agreed as to the principle to be applied, and differed only on the facts of the case. The judgment of Lord Parker of Waddington sets out principles of construction which may well be applied to treaties as well as private law contracts:

It is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

Lord Parker added that it would be very difficult to read a condition subsequent into a time charter-party as distinguished from a charter for a particular voyage. Where *A* had agreed to let his ship to *B* for a specified voyage which subsequently became impossible, it seemed reasonable to say that the foundation of their agreement had fallen in. But where *B* had hired the ship for a given time, during which it was blockaded or interned in a foreign port so that *B* could derive no advantage, it seemed, as Lord Parker said,

<sup>20</sup> [1916] 2 A. C. 397.

that *A* might still claim the payment of the freight. Bailhache, J., and Sankey, J., before whom these shipping cases came in first instance, gave effect to Lord Parker's dictum. But a less rigid view was taken in the Court of Appeal, and the outcome of a good deal of forensic and judicial discussion was expressed in the following conclusions, framed by Bailhache, J., and adopted by the Court of Appeal:

(1) The doctrine of commercial frustration is applicable to a time charter-party.

(2) The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which he is under the terms of the time charter-party entitled to use her, even though that purpose is not the particular purpose for which he desires to use her.

(3) It follows that the doctrine does not apply unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charter-party.

(4) Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charter-party depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter-party.

(5) When for a time the performance becomes impossible, the parties are not to be kept in suspense: they need not "wait and see." The question will be "what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as are before him, including, of course, the cause of the withdrawal, and it will be immaterial whether his anticipation is justified or falsified by the event."<sup>21</sup>

#### IV

The types of supervening change which suffice to terminate a contract may be classified under four heads. First there is the category of contracts *intuitu personae*. If, to take the facts of the leading case, a pianist contracts to play on a certain occasion, and is prevented by illness, the promoter cannot recover damages. The contract is not merely voidable, but void: the pianist would have no right to go through with the engagement if unfit effectually to perform it.<sup>22</sup> This construction is so obvious that it may be said to emerge spontaneously. The case corresponds to that of a political treaty or a concordat whose duration is impliedly contingent on the continuation of the existing form of government in the contracting State.

A second head is that of impossibility arising from an unforeseen exercise of paramount authority, of which *Baily v. De Crespigny*<sup>23</sup> is the type. The

<sup>21</sup> *Anglo-Northern Trading Co. v. Emlyn Jones & Williams*, [1917] 2 K. B. 78, [1918] 1 K. B. 372. Cf. the important discussion in *Bank Line v. Capel & Co.*, [1919] A. C. 435.

<sup>22</sup> *Robinson v. Davison* (1871), L. R. 6 Ex. 269.

<sup>23</sup> (1869), L. R. 4 Q. B. 180. Cf. *Metropolitan Water Board v. Dick, Kerr & Co.*, [1917] 2 K. B. 1, [1918] A. C. 119; *Walton Harvey v. Walker and Homfrays*, [1931] 1 Ch. 145, 274.

defendant in demising premises had covenanted that during the term neither he nor his assigns would build on a plot adjacent to the premises. A railroad company subsequently acquired the plot under statutory powers, and built a station thereon. It was held that the event which had occurred lay outside the sphere of relation created by the covenant, and that the covenant did not apply.

Then there are the contracts *de certo corpore* of which *Taylor v. Caldwell* is the type.<sup>24</sup> Here the perishing of the thing excuses non-performance and releases the other party as well. The rule was the same in most *bonae fidei* contracts in Roman law. But Professor Buckland points out that the texts usually quoted by the English courts to show that *casus* excused performance, properly referred to the ancient contracts *stricti juris*, where it seems that only the party on whom *casus* operated was excused. The other stipulant had to perform his part of the transaction.<sup>25</sup>

Finally, frustration is admitted in cases where it is not the specific subject-matter which has ceased to exist, but the circumstances surrounding that subject-matter and tacitly assumed by the parties as the basis of their agreement. The change of circumstances may operate on the subject-matter directly, as where the chartered ship went aground or was interned; or the effect may be only collateral, as where the procession did not pass before the rented flat.

Where the subject-matter is named *in genere*, and performance becomes impossible by reason of the fact that circumstances contemplated by only one of the parties have changed, the contract is not dissolved. If *A* contracts to sell *B* Finnish timber, and the outbreak of war makes it impossible for *A* to secure the goods in the way he had had in mind, the contract is not dissolved.<sup>26</sup>

## V

It remains to see how far such a doctrine can contribute to a theory of treaty interpretation.

First of all, it is a doctrine applicable to contracts, and has no reference to conveyances. We may, therefore, strike off at once any question of dispositive treaties, particularly treaties of cession, whose effect is produced once for all, leaving no obligation outstanding.<sup>27</sup> This corresponds exactly with the argument of Professor Logoz, agent for the Swiss Federation in the Free Zones Case, in meeting the French contention that the treaty provisions

<sup>24</sup> *Supra*, p. 222. The principle was extended in *Howell v. Coupland* (1874), L. R. 9 Q. B. 462; (1876), 1 Q. B. D. 258, to specific goods not in existence at the time of the contract.

<sup>25</sup> "Casus and Frustration in Roman and Common Law," 46 Harvard Law Review, 1231.

<sup>26</sup> *Blackburn Bobbin Co. v. Allen* [1918], 1 K. B. 540, [1918] 2 K. B. 467; *Jacobs, Marcus and Co. v. Crédit Lyonnais* (1884), 12 Q. B. D. 589; *Ashmore & Son v. Cox & Co.*, [1899] 1 Q. B. 436; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714. What Russell, J., said to the contrary in *Re Badische Co.*, [1921] 2 Ch. 331, was obiter.

<sup>27</sup> Sir John Fischer Williams brings this out clearly, *loc. cit.*, p. 94.

establishing the free zones had lapsed through an essential change in circumstances. M. Logoz's first line of defence (if the French contention was admissible in the last phase of the proceedings) was that the relevant instruments had created international servitudes, *real rights*, *un arrangement territorial*.<sup>28</sup> However, it is of course conceivable that a treaty might operate as a cession or create a *jus in re aliena* subject to a condition subsequent.

It is also to be noted that if the view prevails that so-called law-making treaties, and especially those creating what amounts to constitutional law for the international community, are to be construed on somewhat different premises from treaty contracts, the analogy of frustration will be applicable to the latter category rather than to the former.<sup>29</sup>

The doctrine of frustration is applied, "not to vary, but only to explain" the meaning of a contract. So, as Professor Brierly points out, it does not meet the case of a treaty imposed by force, and containing no time-limit because intended to create a permanent obligation. It is only a crude legal system which tolerates imposed treaties and self-help on a large scale, and does not as a matter of public order impose external limits on the power to contract. But these are defects inherent in the present organization of the international community which no theory of treaty interpretation can cure.

International law may be said to agree with English law in holding that the circumstances whose alteration is invoked as having terminated an obligation must have been the foundation on which the parties contracted. In the Free Zones Case the French Government put forward the following contention:

Il importe seulement de rappeler qu'il est admis en droit international qu'un changement essentiel dans les circonstances de fait en vue desquelles un traité a été conclu entraîne la caducité de ce traité, lorsque est intervenu à cet effet un acte obligatoire pour les Parties, acte qui peut être soit l'accord des Parties, soit une décision d'un juge international compétent.<sup>30</sup>

To which the Swiss agent replied:

Un traité peut être conclu en considération de telles ou telles circonstances de fait, présentes ou futures, sans que cependant les Parties aient eu l'intention commune d'établir un rapport quelconque entre ces circonstances et la force juridique du traité.<sup>31</sup>

No doubt the fact that in 1855 Geneva was practically a free-trade area was present in the minds of the parties to the various relevant instruments, and

<sup>28</sup> Me plaçant donc sur ce terrain [que les zones franches font partie d'un règlement territorial], je dis que le Gouvernement français ne saurait tirer argument du changement des circonstances pour conclure à la caducité des stipulations qui ont institué les zones franches.

Et je crois bien que le Gouvernement français lui-même partage notre opinion, selon laquelle des règlements territoriaux ne peuvent pas être juridiquement affectés par des changements survenus dans les circonstances.

<sup>29</sup> McNair, "Legal Character of Treaties," 11 *British Year Book of International Law* (1930), 100, 110. <sup>30</sup> Publications of the P. C. I. J., Ser. C, No. 58, p. 109. <sup>31</sup> *Ibid.*, p. 485.

no doubt this situation was radically altered, notably by the Federal customs régime of 1849. But to the contention that for that reason the treaty had lapsed, the court replied: "To establish this position it is necessary, first of all, to prove that it was in consideration of the absence of customs duties at Geneva that the Powers decided, in 1815, in favour of the creation of the zones." Neither the text nor the record of the proceedings supported this view. Hence it was unnecessary to consider the theory of the lapse of treaties by reason of change of circumstances.<sup>32</sup> While thus casting its judgment in a negative form, the court is none the less clearly holding that the so-called rule *rebus sic stantibus* does not apply where the factual situation which is said to have altered was not intended by the Powers to be juridically related to the obligation which they created. Such a relation between circumstances and obligation is not to be presumed.<sup>33</sup>

Doctrinal expositions of the principle of *rebus sic stantibus* are prone to break down at the point of formulating a criterion of the *essential* change in circumstances which calls the principle into operation. Judge Anzilotti, on the contrary, has put the matter with characteristic clarity and with as great precision as the nature of the case permits. What is remarkable is that his formulation might be incorporated bodily into a treatise on the English law of contracts:

Un changement essentiel dans les circonstances ce fait peut-il produire l'extinction du traité?

C'est là une question d'interprétation de volonté. Le droit international fait dériver du traité des obligations et des droits en considération de la volonté des parties; celles-ci, en d'autres termes, sont obligées si elles l'ont voulu et dans la mesure où elles l'ont voulu. Si des circonstances déterminées de fait ou de droit ont été prises en considération par elles comme une présupposition des obligations assumées, la disparition de ces circonstances implique que l'on ne se trouve plus dans les limites de la volonté exprimée dans le traité, qui subordonne à la condition d'existence de ces circonstances l'acceptation des obligations dont il s'agit.<sup>34</sup>

<sup>32</sup> Ser. A/B, No. 46, p. 156.

<sup>33</sup> The facts precluded any serious effort by the distinguished counsel for the French Government to show that, irrespective of the abrogative effect of Art. 435, the old stipulations had lapsed by force of the *clausula rebus sic stantibus*. M. Paul-Boncour said: "Nous n'avions pas plaidé, et nous ne plaiderons pas davantage aujourd'hui, que l'application de cette clause à l'espèce devait entraîner *ipso facto* l'abrogation des stipulations de 1815." (Ser. C, No. 19-I, p. 67.) In the third phase Prof. Basdevant put the contention on higher ground, but seemingly with little confidence. M. Dreyfus, judge *ad hoc*, in his dissenting opinion, nowhere says that as a matter of general international law the engagements of 1815 and 1816 had lapsed: he speaks of the effect of changed circumstances as being "un seul problème qui tient à la fois du caractère juridique et d'opportunité," and says of the majority judgment that "sans doute, le droit strict aura été respecté, mais la Cour avait-elle été chargée par les Parties d'assurer coûte que coûte ce respect rigoureux du droit, sans avoir à se préoccuper de l'opportunité?" (Ser. A/B, No. 46, pp. 203, 212.)

<sup>34</sup> *Cours de droit international* (Gidel, trans.), p. 462.

The mere fact that the obligation has become more onerous than could have been foreseen does not terminate the contract. When the outbreak of the World War threw the whole system of commercial agreements out of balance, neither the doctrine of frustration in England nor the plea of *imprévision* in France sufficed to meet the situation. In both countries it was necessary to resort to legislation.<sup>35</sup> This suggests that similar limits will apply to the interpretation of treaties. It is peculiarly the genius of international justice that it leans against hard law and favors *benignior* solutions; but it can scarcely be an acceptable rule to say that a treaty shall be held to have lapsed "when it becomes ruinous to [a State's] wealth or its commerce," or "when its execution becomes contrary to the nature of things."<sup>36</sup> If it is proposed to lay down a rule of law that a treaty shall lapse, not only by force of some implicit resolute condition, but also by virtue of some limit operating *ab extra* (as is often asserted by writers), then the nature of that external limit must be given a much less nebulous expression.

There is no necessary reason why a resolute condition should not turn on some alteration in moral as well as material circumstances. In international law both the *causes célèbres* and the doctrinal discussions of the *clausula* have had to do largely with a change in moral conditions. Here it is difficult to keep on firm footing. When during the Second Assembly of the League of Nations the Bolivian Government invoked Article XIX in the course of its difference with Chile, a committee of jurists was asked to report on the powers of the Assembly under this article. Their reply was that the advice to reconsider

can only be given in cases where treaties have become inapplicable—that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of international conditions whose continuance might endanger the peace of the world.<sup>37</sup>

This is a gloss on the word "inapplicable" as used in Article XIX, and the committee were not saying that whenever a change in moral circumstances warranted the Assembly in declaring a treaty "inapplicable" it was *ipso facto* terminated.<sup>38</sup> No doubt contemporary moral as well as material circumstances might be the foundation on which the high contracting parties

<sup>35</sup> Cf. the Courts (Emergency Powers) Acts, 1914 to 1917, and the Report of Lord Buckmaster's Committee on the Position of British Manufacturers and Merchants in Respect of Pre-War Contracts, Parl. Papers. (1918), Cd. 8975; *Loi du 21 janvier 1918 (Loi Failliot)*.

<sup>36</sup> Bolivian Reservations to the Havana Convention on Treaties (1928), 4 Hudson, International Legislation, 2378, 2385.

<sup>37</sup> Records of the Second Assembly, Plenary Meetings, p. 466. The committee comprised MM. Scialoja (Italy), Urrutia (Colombia), and de Peralta (Costa Rica).

<sup>38</sup> Elsewhere Judge Urrutia has drawn a sharp distinction between treaty provisions which should be revised because "inapplicable" and those which are terminated because impossible of execution. *Le continent américain et le droit international*, p. 284.

treated, and if that foundation is alleged to have collapsed there is no reason why the Permanent Court could not appreciate the merits of such a contention. Considerations of much the same order had to be taken into account in the matter of the Austro-German Customs Union. In the case of the Nationality Decrees in Tunis and Morocco the court found it unnecessary to pass upon the French contention that the treaties in question had determined because of the legal and judicial reforms which the French Government had subsequently introduced; nor did the Chino-Belgian case ever come before the court on its merits. However, if it could be shown that a capitulatory régime had been created subject to a tacit condition that it was to determine on the accomplishment of certain reforms, and that the condition had now been fulfilled, it would be for the court to draw the appropriate conclusion. This would admittedly be a very delicate business.

An alteration in the form of government of a State, accompanied by a transformation in the popular conception of the state purpose and in the whole orientation of a nation—such as has taken place in Russia, Italy, and Germany—might very well call into operation a tacit resolute condition in a treaty. As the Swiss Federal Tribunal said apropos of the contention that the transformation which had taken place in the Russian State had dissolved the obligations of a treaty with Switzerland:

It is a principle of international law, recognized and absolutely uncontested, that the modifications in the form of a government and in the internal organization of a State have no effect on its rights and obligations under the general public law; in particular, they do not abolish the rights and obligations derived from treaties concluded with other States. . . . The fact that, in the particular case, the change in the form of the government has carried a profound alteration of all the internal juridical organization and of the relations of individuals among themselves and with the State, the fact that from all this there has resulted a situation contrasting fundamentally with the order prevailing in all the other European States, may have given to the other contracting States, the right to withdraw eventually from the agreement, by virtue of the principle of public law known under the name of the *clausula rebus sic stantibus*, by reason of the disappearance of the state of things in view of whose existence and continuation the Convention was concluded.<sup>39</sup>

What is important to bear in mind is that if a change in moral circumstances were invoked as having caused the determination of a treaty, the question, as the Federal Tribunal said, would be whether there had been a disappearance of the state of things in view of whose existence and continuation the treaty was concluded. It would turn on the intention (1) common to both parties, (2) at the time when the agreement was made. If the change alleged amounted to no more than this, that one of the parties had come to

<sup>39</sup> *Lepeschkin v. Gosweiler* (1923), *Entscheidungen des schweizerischen Bundesgerichts*, 49.1. 188. The quotation is taken from Hudson's *Cases*, p. 100. The text is reproduced in the *Bulletin de l'Institut Intermédiaire International* (1923), IX, p. 31, and summarized in the *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 189.

the point where it no longer intended to abide by the treaty, quite clearly this would be of political but not of legal significance. Stated baldly, this is a platitude, but one is well aware that the contention can be embellished until it looks more plausible.

A significant aspect of the frustration cases has been the willingness of the English courts to imply a resolutive condition when express exceptions *ejusdem generis* have been embodied in the contract.<sup>40</sup> The maxim *expressio unius exclusio alterius* which figures so largely in discussions of treaty interpretation is not an inexorable rule, but only a symbol for what is, generally speaking, a reasonable view of a written instrument.<sup>41</sup>

Lord Sumner's judgment is often quoted to the effect that the doctrine of frustration is a device for reconciling the rules as to absolute contracts with a special exception which justice demands.<sup>42</sup> Doubtless it is more just than a rigorous insistence on the *ipsissima verba*. But in fact its operation may be most unjust. For when frustration supervenes, the English courts have been content to declare that the contract ceases to bind *in futuro*, but to leave the parties in the position where the event found them. So in the Coronation Cases, if money was due prior to the date when the procession was cancelled, not only did the promisor lose whatever he had paid, but the promisee could recover any balance which had fallen due at the moment of frustration, although he rendered nothing in return. The judges who evolved the rule admitted that it was "to some extent an arbitrary one," justified only *faute de mieux*.<sup>43</sup> The House of Lords has never accepted the

<sup>40</sup> *E.g.*, *Embiricos v. Sydney Eid & Co.* [1914], 3 K. B. 45. By the charter-party, plaintiff's ship was to proceed to the Sea of Azoff, there to load a cargo of grain for a port in the United Kingdom. It was agreed that the contract should be mutually cancelled if any difficulty due to war arose previous to cargo being shipped, or if the Dardanelles should be closed when the ship arrived east-bound. In fact the ship reached its loading port and had part of the cargo on board when war broke out between Greece and Turkey. The ship, being Greek, was thereby indefinitely prevented from leaving the Black Sea, and the charterers were held justified in throwing up the contract.

<sup>41</sup> *Cf.* the remarks of Judges Anzilotti and Huber on the interpretation of treaties, in the *Wimbledon* case, Publications of the P. C. I. J., Ser. A, No. 1, at p. 36; also the dissenting opinion of the former in the matter of the convention concerning employment of women during the night, Ser. A/B, No. 50, at p. 383.

Where a treaty may be denounced after a short period, as five or ten years, it would be difficult to imply a resolutive condition. *Cf.* the judgment of the *Trib. civ. du Caire* in *Rothschild v. Gouvernement égyptien* (1925), 52 *Clunet*, 1091, Annual Digest, 1925-1926, Case No. 14; also Professor Wilson's note, this JOURNAL, Vol. 27 (1933), p. 104. The Treaty on the Limitation of Naval Armament of 1922 expressly contemplated (Art. 21) the possibility of a change of circumstances requiring a reconsideration of the treaty even during the relatively short period for which it was concluded.

<sup>42</sup> *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A. C. 497, at 510.

<sup>43</sup> *Collins, M. R.*, in *Chandler v. Webster*, *supra*, at 499. He agreed elsewhere that *restitutio in integrum* would be desirable if it were feasible. *Elliott v. Crutchley*, *supra*, at p. 569. Viscount Finlay said the rule was "rough and ready," and did not work badly in cases where consideration was given *pari passu* with performance on the other side. *Cantiare San Rocco v. Clyde Shipbuilding Co.*, [1924] A. C. 226, at 243.

rule,<sup>44</sup> and in refusing to impose it upon Scots law it has reserved perfect freedom to find that the law of England is otherwise if a case should come before it. The Scottish law lords were shocked at the crudity of the rule applied by the English Court of Appeal in comparison with the more refined principle of the civil law. As Lord Shaw of Dunfermline said,

The law of Scotland, as, indeed, the law of Rome, anxiously endeavours to disentangle a complex situation so as to make restitution exactly fit the case, and restore both parties as nearly as possible to the position which they would have occupied before the unexpected interruption or calamity occurred.<sup>45</sup>

It would be unprofitable to attempt to project this question on to the plane of international relations. For from the nature of the case it is unlikely that there would be any question of restitution in the event that a treaty was held to have lapsed by force of supervening change. What is a more likely eventuality is that, as *e.g.* in a case of State succession, a treaty obligation might become impossible of literal fulfilment, and from the intention of the high contracting parties it seemed right to infer, not that the treaty was dissolved, but that it should be adapted to the new conditions. This is the situation envisaged by Article 11 of the Havana Convention on Treaties:

If the organization of the State should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions.<sup>46</sup>

Such an adaptation might be a matter of law which would fall within the province of a court. It might, on the other hand, be a matter of the interplay of economic or political forces lying outside the scope of the judicial function, as would have been the establishment of a new customs régime in the Free Zones of Gex and Upper Savoy.

## VI

It remains briefly to consider the second analogy suggested, that of the extinction of restrictive covenants by operation of a change in circumstances.

Those *jura in re aliena* which are commonly described as state servitudes are the international counterparts of the easements of English law and of the

<sup>44</sup> The statement of Lord Parmoor in *French Marine v. Compagnie Napolitaine* (1921), 27 Comm. Cas. 69, 94, formed no part of the judgment of the House of Lords: per Lord Finlay, [1924] A. C. at 241.

<sup>45</sup> *Cantiare San Rocco v. Clyde Shipbuilding Co.*, *supra*, at p. 255.

In deciding these frustration cases, from *Taylor v. Caldwell* on down, the English courts have turned for inspiration to the Roman law. Professor Buckland points out that in these excursions the judges went astray, but thanks to a double error they have come out of the woods nearer to the right point than might have been expected. "Causus and Frustration in Roman and Common Law," 46 *Harvard Law Rev.* 1231, 1284.

<sup>46</sup> Hudson, *International Legislation*, IV, 2378, 2381.

restrictive covenants running with the land which are enforced in equity. Where a restrictive covenant has been entered into, the covenantor and his successors in title are bound in equity, in order that the owner of the dominant tenement and those who hold under him may more amply enjoy their adjacent lands, to refrain from using the servient tenement in some specified way. In the course of time the character of the neighborhood may change so that the property cannot be used with profit consistently with the terms of the covenant. The successor of the covenantor puts the land to some prohibited use, and the owner of the dominant tenement seeks an injunction. The Duke of Bedford *v.* Trustees of the British Museum<sup>47</sup> arose on such a covenant made in 1675, it being the intention of the original parties that two families should inhabit adjacent mansions under restrictions calculated to preserve the rural amenities. In the course of years the dominant tenement became covered with buildings. Then in 1822 the covenant was invoked to enjoin the erection of an addition to what had in the meantime become the British Museum. It was held that equity would not enforce a restriction where the plaintiff or his predecessors had acquiesced in such alterations of the property that the object of the covenant had been defeated. A restrictive covenant may lapse because the covenantee has himself violated its spirit or intent, or has acquiesced in such violations, or has been dilatory in suing. Furthermore, it is now clear that a change of circumstances in the neighborhood embraced within a building scheme, though without any such acquiescence by the owner of the dominant tenement, may yet render the plaintiff's suit so unmeritorious that an injunction will be refused.<sup>48</sup> In a judgment which went farthest in taking account of change of circumstances irrespective of the acts or omissions of the plaintiff and his predecessors, Sargant, J., said:

The effect would, but for the principles applied in the cases I have referred to,<sup>49</sup> have been to stereotype and perpetuate, far beyond the real intention of the parties, and to the prejudice of successive generations, restrictions which had in the course of time become obsolete and meaningless.<sup>50</sup>

As Professor Borchard points out,<sup>51</sup> where a declaratory judgment may be rendered, it provides the most expeditious procedure for determining whether a restrictive covenant has become unenforceable.

The congestion of modern living conditions necessitated machinery for the revision or discharge of restrictive covenants with a flexibility far beyond the

<sup>47</sup> (1822), 2 My. and K. 552.

<sup>48</sup> Dictum of James, L. J., in *German v. Chapman* (1877), L. R. 7 Ch. D. 271, approved by Lindley, L. J., in *Knight v. Simmonds*, [1896] 2 Ch. 294, 299. A stricter view had been expressed by the Court of Appeal in *Sayers v. Collyer* (1883), 28 Ch. D. 103.

<sup>49</sup> Cited in note next above.

<sup>50</sup> *Sobey v. Sainsbury*, [1913] 2 Ch. 513, 529. Adversely commented upon by Farwell, J., in *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224, 227.

<sup>51</sup> "Judicial Relief for Peril and Insecurity," 45 *Harvard Law Review*, 793, 822-6.

limits of the discretion of a court of equity, and led in Great Britain to legislation setting up an administrative process to that end. By the Law of Property Act, 1925, § 84, it is provided that one or more official arbitrators<sup>52</sup> shall (without prejudice to any concurrent jurisdiction of the court) have power by order wholly or partially to discharge a restrictive covenant on being satisfied that by reason of changes in the character of the property or the neighborhood or other material circumstances the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons. Compensation is contemplated on the basis of actual loss to the covenantee. If suit is brought to enforce a restrictive covenant, the court will in a proper case, on the application of the defendant, stay the case to allow proceedings to be brought before the statutory authority.<sup>53</sup>

It may well be that the policy which inspired Article XIX of the Covenant may eventually be attained in part by some international agency contrived on lines similar to those sketched above. Where the need is to modify a covenant rather than to enforce it in good conscience, the solution lies in a proceeding which, though restrained within legal limits, is not in itself judicial. The pressure of contemporary needs impelled chancery judges to strain doctrine in order to deny enforcement of restrictive covenants in cases where injustice would be done,<sup>54</sup> and it is believed that the new legislation by meeting this need has relieved the pressure upon judicial interpretation. In much the same way it may be expected that some rational method of realizing the promise of Article XIX would reduce the exorbitant propositions which the doctrine of *rebus sic stantibus* now connotes. The notion of implied resolutive conditions would then be seen as only one feature in the judicial interpretation of treaties, and not as some incalculable devastating force.

<sup>52</sup> Who are selected according to rules made by a Reference Committee consisting of the Lord Chief Justice, the Master of the Rolls, and the President of the Surveyors' Institution. Similar legislation on a smaller scale was contained in the Housing and Town Planning Act, 1919, § 27.

<sup>53</sup> *Fielden v. Byrne*, [1926] 1 Ch. 620.

<sup>54</sup> *Sobey v. Sainsbury*, *supra*; *Sharp v. Harrison*, [1922] 1 Ch. 502; *Achilli v. Toveil*, [1927] 2 Ch. 243.

## EXTRATERRITORIAL JURISDICTION IN THE ANCIENT WORLD \*

BY SHALOM KASSAN †

It is now an established principle of modern international law, that there exists in every independent State but one body of law. This body of law is administered by all the courts alike over all persons and things within its territorial limits. These courts, within the limits of their respective jurisdictions, do not discriminate between the various inhabitants of the State.<sup>1</sup> The origin, nationality or religion of the people who appear before the courts is not questioned, and is not of any importance.<sup>2</sup>

In 1812, Chief Justice Marshall of the Supreme Court of the United States, expressed his opinion on this subject in the following words:

When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it.<sup>3</sup>

\* The writer is much indebted to Professor Quincy Wright, of the University of Chicago, and to his dear friend Dr. Alexander M. Dushkin, for their kindness in reading this manuscript and for their valuable suggestions.

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<sup>1</sup> Henry Wheaton, *Elements of International Law* (6th ed. 1885), p. 200; Sir Robert Phillimore, *Commentaries upon International Law* (2nd ed. 1871), Vol. 1, p. 376; W. E. Hall, *A Treatise on International Law* (5th ed. 1904), p. 50 ff, 166 ff; L. Oppenheim, *International Law* (1905), Vol. 1, sec. 317 ff; J. B. Moore, *A Digest of International Law* (1906), Vol. 2, p. 4; and T. J. Lawrence, *The Principles of International Law* (6th ed. 1915), p. 212.

<sup>2</sup> The second quarter of this century, however, witnesses a regress in this principle. Thus, in Germany today, the origin and religion of the people are questioned and play an important rôle in the procedure and in the decision of the court.

It might be of interest to mention here that deportation of aliens from the United States is entrusted to the executive officers without any judicial proceedings or intervention, and no appeal to the courts is accepted (12 Wall. 457; 130 U. S. 581; 142 U. S. 651; 149 U. S. 698, 711; 150 U. S. 476). The same policy practically is also adopted in other countries (Ernst Freund, *The Police Power, Public Policy and Constitutional Rights*, Chicago, 1904, p. 726 ff; Edwin Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1915, p. 48 ff).

<sup>3</sup> *The Schooner Exchange v. M'Faddon*, 7 Cranch, 116, 143.

In other words, the application of the law in a modern country is based on a territorial and not on a personal basis. This principle leads us to the conclusion that a person who changes the country in which he lives, automatically changes also the law he is subjected to.<sup>4</sup> An illustration will make this clear. An American citizen who lives in France is subject to French law and to the jurisdiction of the French courts.<sup>5</sup> There are no American courts in France, neither is American law applied there.<sup>6</sup> All the courts in France are French and apply French law only.<sup>7</sup> It is immaterial in the eyes of the French court whether that American has adopted French citizenship or whether he still retains his American nationality. Neither would it matter whether that American is Christian, Moslem or Jew. The same illustration would apply in the case of a Frenchman or any other foreign citizen in this country.<sup>8</sup> All are alike in the eyes of the modern court.<sup>9</sup>

It is natural, therefore, that Francis Wharton should begin his excellent voluminous work on international law with the statement that "the authority of a nation within its own territory is absolute and exclusive."<sup>10</sup>

Special circumstances, however, have created radical exceptions to the application of this principle. In countries like China, Japan, Turkey, Egypt, Morocco, and various other States of the Levant and Africa, there

<sup>4</sup> F. Wharton, *A Digest of the International Law of the U. S.* (2nd ed. 1887), Vol. 2, p. 432, section 198.

<sup>5</sup> While the French courts freely exercise jurisdiction over suits between Frenchmen and foreigners, it is rather vague and uncertain, however, whether French courts enjoy the jurisdiction in suits between foreigners (Phillimore, *op. cit.*, Vol. 4, p. 726; "Jurisdiction in Actions Between Foreigners," by Professor Fillet, in 18 *Harvard Law Review*, 325). This is not the case in England or in the United States. Even though both parties are subjects of a foreign state, the local courts entertain exclusive jurisdiction (Dicey, *Conflict of Laws* (5th ed. 1932), p. 219 ff).

<sup>6</sup> Seamen, however, serving on American vessels, regardless of their nationality, are subject to the jurisdiction of the United States and are tried by an American consular court (140 U. S. 453). Non-British seamen, on the other hand, serving on British vessels, are not subject to British law. They are turned over to the consul of the country of which they are nationals (Hall, *op. cit.*, p. 140 ff; Borchard, *op. cit.*, p. 471 ff).

<sup>7</sup> However, questions of "personal status," as well as the succession to movables, are governed on the continent of Europe, including France, and also throughout the Orient, by the law of the person's nationality. In this country, as well as in England, the law with regard to personal status is regulated on the same territorial doctrine as any other civil or criminal matter.

<sup>8</sup> Two exceptions have to be admitted. Laws creating public privileges—such as the right to vote in city, state or other government elections, or to be elected a member of a governing body, or to be appointed to government positions, also laws imposing public duties, such as military service—apply to the citizens of the State only. Again, foreign sovereigns and ambassadors are exempted from the local jurisdiction (Moore, *op. cit.*, pp. 558, 774; John Westlake, *A treatise on Private International Law* (1905), p. 246 ff).

<sup>9</sup> For a thorough study on this particular matter, see "The Jurisdiction of Courts over Foreigners," by Professor Beale in 26 *Harvard Law Review*, 193 and 283.

<sup>10</sup> Wharton, *op. cit.*, Vol. 1, p. 1. Marshall, C. J., used the same terms in *The Exchange* (*supra*, p. 135), and in an earlier case, *Church v. Hubbard* (1804), 2 Cranch, 187, 234.

exist or existed, fundamental and vital differences of social habits, standards of life, laws and customs, a diversity of moral sentiments and political institutions, with a primitive animosity towards foreigners due to difference in religious beliefs. Members of a European civilization could not, therefore, possibly abide by, and live according to, their regulations. Their ideas of justice were different from those of the Western world, and were not adequate to preserve the life, property and honor of foreign citizens before native courts. This naturally necessitated a departure from the rule of territorial jurisdiction.<sup>11</sup> This exemption from the operation of the local law, and the allegiance of the foreign citizen to his national law, is termed "Extraterritoriality," since it is exercised outside of the borders of his own state.<sup>12</sup>

#### THE ORIGIN OF EXTRATERRITORIALITY

In seeking the origin of extraterritoriality, some jurists and historians trace it to the imperialistic period of the last century. Others find the origin of this jurisdiction in the "letters of privilege" which the Greek Christian rulers at Constantinople, and later their Moslem conquerors, issued to the city republics of Italy in the 11th and 12th centuries. Again, others trace it to the period of the Roman Empire. Quite a few writers, on the other hand, seem to be satisfied with the obviously less troublesome assumption, that the original document concerning extraterritoriality is to be found in the treaty of 1535 between the Franks and the Turks.

It is the writer's opinion that the origin of extraterritorial privileges has

<sup>11</sup> It was the constant struggle of these and other States during the latter part of the last century—and in some cases up to the present day—to be emancipated from the restraints on their absolute authority within their territory. Japan, indeed, had shown in 1894 that her strength and her civilization could achieve a Western level. The Great Powers of Europe and the United States were fully convinced that the native courts in Japan could afford sufficient security for the lives and property of their subjects resident in her territory. They, therefore, abolished the extraterritorial privileges which they previously enjoyed. Great Britain led the way; the others followed. By the end of the century, Japan's emancipation was fully accomplished, and Japanese law has since been applied to natives as well as to foreign citizens. Turkey, China, Persia, Albania and others were anxious to follow the footsteps of Japan. Turkey, Persia and Albania finally acquired absolute authority over their territories and over all the inhabitants within their territories about a quarter of a century later. (Moore, *op. cit.*, Vol. 2, p. 593; John Westlake, *International Law*, 1910, Pt. 1, pp. 40, 206; Wharton, *op. cit.*, Vol. 2, p. 485, sec. 193; Phillimore, *op. cit.*, Vol. 1, p. 392.) The United States exercised extraterritorial jurisdiction in Bulgaria up to the end of the World War (Borchard, *op. cit.*, p. 433). China and Egypt are still fighting for unlimited authority over all the people in their States, but as yet have not succeeded. In other Eastern and African territories, such as Madagascar, Algiers, Morocco, Syria, Palestine, etc., the extraterritorial régime was relinquished as soon as those territories were placed under the jurisdiction of a Western Power. Special provisions, however, were maintained for the safeguarding of foreign citizens.

<sup>12</sup> Borchard, *op. cit.*, p. 430 ff. For an excellent presentation of the equality of States as it appears in the theory of international law, see "The Equality of States in International Law," by Professor Edwin D. Dickinson (Harvard University Press, 1920).

to be traced much earlier even than the period of early Rome and the Germanic tribes. Traces are found in the more ancient world. The principle of territorial law and sovereignty was unknown in the ancient world. It was even vague in the Middle Ages. In fact, kingdoms during the medieval period had vague and uncertain boundaries.<sup>13</sup> Indeed, even during the first centuries of what we call modern history, no such conceptions as territorial law or territorial sovereignty were entertained. Sovereignty was not associated with dominion over a territory. It was a tribe-sovereignty. It is true that territorial titles were not unknown. But they seem at first to have come into use only as a convenient mode of designating the ruler of a portion of a tribe's possession. The ruler of the entire tribe was the ruler of his flock, and not of his flock's land. Thus, we used to speak of the "King of the Franks." We still speak of the "King of the Belgians," etc.<sup>14</sup> Again, in the earlier stages of human development, it was the religion, race or the nationality of the people rather than the territory, which formed the basis of a community of law. Legal rights and obligations were only bestowed upon members of the same religion. Foreigners were barbarous in the eyes of early men. Early man stood in great fear of the magic of strangers. He resorted to a variety of ceremonies in order to protect himself against the devilish power of the stranger.<sup>15</sup> But in the course of time the natives were convinced that this attitude of strict exclusiveness could not be permanently maintained. As soon as they failed to find in their own association the satisfaction of their desires and the supply of their wants, they were compelled to go beyond it and enter into relations of some sort with the surrounding world. The alien, therefore, was incapable of amenability to the same jurisdiction to which the natives were subjected. For this reason we find that in the ancient world foreigners were either subjected to their own laws and customs or were placed under a special jurisdiction. It is in these relations and under these conditions that we find the earliest traces of extraterritoriality.

<sup>13</sup> Moore, *op. cit.*, Vol. 2, p. 761; Westlake, *International Law* (1910), Pt. 1, p. 88; David Jayne Hill, *A History of Diplomacy in the International Development of Europe* (1924), Vol. 2, p. 48.

<sup>14</sup> Sir Henry S. Maine, *Ancient Law* (1906), p. 106 ff.

<sup>15</sup> Sir James G. Frazer, *Folk-Lore in the Old Testament* (1918), Vol. 1, p. 418. Whatever may be the proximate causes, whatever may be the precise degree of his fear and hatred, still the fact remains that even to this day the savage fears and hates the stranger. He looks upon him as an enemy, and it may be as a being brutish, monstrous or devilish. P. J. Hamilton Grierson, *The Silent Trade*, 1903, p. 30 ff; G. Taplin in J. D. Wood's, *The Native Tribes of South Australia*, p. 1 ff; R. F. Burton, *The Captivity of Hans Stade of Hesse in A.D. 1547-1555 among the Wild Tribes of East Brazil*; C. M. Doughty, *Travels in Arabia Deserta* (1921), Vol. 1, pp. 276, 170, 580; W. R. Smith, *Lectures on the Religion of the Semites* (1894), p. 121 ff.

## IN EGYPT

The Egyptians considered all foreigners unclean. They would not eat with them nor have any personal relations with them.<sup>16</sup> Foreigners were therefore secluded. It would have been considered a degradation if foreigners had been allowed to have the same rights and duties which the Egyptian law provided for natives. Hence we meet the various foreign colonies with their own personal laws.

When the Jews migrated into Egypt from the land of Canaan (about 1500 B.C.), they were assigned the region of Goshen. Here they lived under their own patriarchal system as was practiced by them in Canaan. They possessed their own elementary institutions for the maintenance of justice and order. Simple rules for the punishment of offenders were administered, their tribal leaders acting as judges.<sup>17</sup>

The Jews were not the only foreigners who received permission to settle in Egypt.<sup>18</sup> In the 18th dynasty (1580-1350 B.C.) the Mentin, a nomadic tribe, were expelled from their homes and were allowed to settle in a prescribed locality in the region of Goshen. Again, under Merneptah (1220 B.C.) a body of Shasu (Bedouin) obtained a colony in Egypt to live in.<sup>19</sup> During the reign of Ramses II (1292-1225 B.C.) there lived many Phoenicians and other aliens in Egypt. The Phoenicians were assigned a specific part of Memphis to live in. It soon became known as the "camp of Tyrians," the Phoenicians being of the city of Tyre. Here they had their own temples and worshipped Baal and Astarte, their own gods.<sup>20</sup> The merchants of Tyre were subject to their own laws.<sup>21</sup>

Again, at the time of King Psamtik I (663-609 B.C.) we find Greek settlements in Egypt, especially in the Western Delta. In Memphis there lived besides Greeks also other foreigners. Other large cities were apportioned to accommodate the foreigners.<sup>22</sup> Near Bubastis, foreign merchants were given a permanent settlement.<sup>23</sup>

Amasis (570-526 B.C.), or, as he is also known, Ahmose II, did not permit the Greeks to settle where they pleased, as they were evidently allowed to do theretofore. Naucratis, a new city, was granted to them. Here they lived under their own laws and worshipped their gods.<sup>24</sup> Naucratis was "in all essentials a Greek city."<sup>25</sup> The Greeks had also the right to appoint

<sup>16</sup> Herodotus, 2: 41; Genesis, 43: 32; A. H. Sayce, *The Early History of the Hebrews* (1897), p. 174.

<sup>17</sup> S. R. Driver, *The book of Exodus* (1911), p. xlvi.

<sup>18</sup> A. H. Sayce, *The Higher Criticism* (5th ed. 1895), pp. 222, 248; *Early Israel and the Surrounding Nations* (1899), p. 44 ff; *Early History of the Hebrews*, p. 212.

<sup>19</sup> David G. Hogarth, *Authority and Archaeology* (1899), pp. 59, 68.

<sup>20</sup> Herodotus, 2: 112; James Henry Breasted, *A History of Egypt* (1924), p. 448.

<sup>21</sup> Sir Travers Twiss, *Law of Nations* (2nd ed. 1884), Vol. I, p. 444.

<sup>22</sup> Breasted, *op. cit.*, p. 577 ff.

<sup>23</sup> A. H. Sayce, *The Ancient Empires of the East* (1886), p. 53 ff.

<sup>24</sup> Sayce, *op. cit.*, pp. 55, 180; G. Maspero, *The Passing of the Empires* (850 B.C.-330 B.C.), 1900, p. 647 ff.

<sup>25</sup> Breasted, *op. cit.*, p. 590.

the governors of the city.<sup>26</sup> That the Greek colonies in Egypt constituted a real *imperium in imperio* may be fully gathered from the following quotation from Phillipson:

The Egyptians often allowed foreign merchants to avail themselves of local judges of their choice and even of their own nationality in order to regulate questions and settle differences arising out of mercantile transactions, in accordance with their foreign laws and customs—the Greeks especially enjoyed these privileges on Egyptian territory.<sup>27</sup>

#### IN BABYLONIA

In Babylonia we do not find the jealous exclusiveness which we found in Egypt and which characterized most of the nations of antiquity.<sup>28</sup> It is partly due perhaps to the mixed character of the Babylonian race. Most probably the commercial instinct of the people was largely responsible for their liberal view towards foreigners. The Babylonians welcomed into their midst both the foreigners and their gods.<sup>29</sup> Nevertheless, the sacred law, which was ascribed to Ea, the god of Culture, could not apply to strangers. The state judges issued their judgments in the name of and on behalf of the gods. Hence special judges heard cases in which both parties were foreigners. The judges belonged to the same nationality as the litigants. Furthermore, if it was the law of the litigant's country to have the trial heard before a jury, the same procedure was followed, even though Babylonian natives were not tried before a jury. In case one of the parties was a Babylonian native, the case was re-heard by a native tribunal. The foreigners settled in special districts. One of these colonies was known as "the district of the Amorites." It seems that the foreigners could freely buy and sell land and other property.<sup>30</sup> Another interesting fact in Babylonia was that it was quite common for the Babylonian authorities to grant to an entire community immunity from taxation and other burdens. Such a decree was granted about 1200 B.C. by Nebuchadnezzar I to the district of Bit Karziyabku. The Babylonian Government ceased to have authority and jurisdiction in this community. The real motive is hard to guess and remains an open question. Perhaps it was due to commercial reasons. It may also be in the fact that the Babylonians would rather exempt foreign communities from their sacred jurisdiction than to allow them to enjoy it.<sup>31</sup>

<sup>26</sup> Herodotus, 2: 154, 178; H. R. Hall, *The Ancient History of the Near East* (7th ed. 1927), p. 528 ff.

<sup>27</sup> Coleman Phillipson, *The International Law and Customs of Ancient Greece and Rome* (1911), Vol. I, p. 193.

<sup>28</sup> S. A. Cook, *The Laws of Moses and the Code of Hammurabi* (1903), p. 276.

<sup>29</sup> M. Jastrow, *The Religion of Babylonia and Assyria*, p. 664.

<sup>30</sup> A. H. Sayce, *The Early History of the Hebrews* (1897), pp. 57-58.

<sup>31</sup> A. H. Sayce, *Babylonians and Assyrians* (1399), p. 186 ff. Professors Olmstead (*History of Assyria*, 1923) and Jastrow (*The Civilization of Babylonia and Assyria*, 1915) are silent on the subject of the foreigner's status in that part of the ancient world.

## THE FOREIGNER AMONG THE HEBREWS

This chapter deserves a paper by itself. The writer regrets that due to limited space allowed, he has to satisfy himself with a rough sketch of the status of the foreigner among the Hebrews.

The Old Testament, of course, is the basic law. An extensive literature, however, has been written on this subject through the ages, ever since the time of Josephus.<sup>32</sup>

The position of the alien in the pre-Canaanite period is not quite known. After the settlement in Canaan and up to the time of Solomon, the relations between Jews and foreigners seem to have been free and unrestricted. When a political supremacy became established in Israel, the birth of a distinct national feeling was noticed. Gradually the rights of citizenship were in part formally restricted to the Israelites. Some of the foreign tribes were reduced to slavery. (Joshua, 9: 27; First Kings, 9: 20 ff.) The rest occupied an inferior position. The ancient Hebrews distinguished two classes of aliens. The *Ger Toshab* denoted a resident alien. He was a foreigner who settled in the land for a longer or shorter period. He was protected by a private citizen or family, clan, powerful chief, or sometimes by the State.<sup>33</sup>

The second class, *Nochri*, or *Ben Nechar*, simply denoted a foreigner. This alien was governed by his own laws and customs while in Palestine. The *Ger Toshab*, the resident alien, became domiciled in the Jewish land by choice and, therefore, was subject to Jewish law, civil and criminal. In other words, with regard to the foreigner who did not intend to stay in the country, the alien of passage, as he is sometimes referred to, the Jews administered the same principles as the other nations in ancient times. But with regard to foreigners who worshipped Yahweh, as the God of the land of Israel, without necessarily renouncing their allegiance to the gods of their native land,<sup>34</sup> there was the principle, "There shall be one law for you and for the stranger that sojourneth with you."<sup>35</sup>

There are constant exhortations to deal justly and generously with the *Ger*. (Ex. 22: 20). He is grouped with other needy and helpless classes (Dt. 26: 12; Lev. 19: 10). The Prophets (Jer. 7: 6, 22: 3; Ezek. 22: 7,

<sup>32</sup> Of some of the more recent works the reader is referred to *Das Judentum und seine Umwelt*, Berlin, 1927, by Michael Guttman. "A vivid background for the study of Hebrew Law," in general, is supplied by my former teacher, the late Professor J. M. P. Smith, in his *Origin and History of Hebrew Law*, University of Chicago Press, 1931. Alfred Bertholet's "*Die Stellung der Israeliten und der Juden zu den Fremden*," Freiburg, I. B., 1896, ought not to be ignored.

<sup>33</sup> The social position of the Hebrew *Ger Toshab* is similar to the corresponding Arabic *Jar*. Semitic communities were composed, in addition, of free tribesmen of pure blood, also of a class of people who were personally free, but had no political rights. They were protected strangers. See Smith, *Religion of the Semites*, p. 75 ff, and also his *Kinship and Marriage in Early Arabia*, p. 40 ff.

<sup>34</sup> Compare Second Kings, 17: 24-41.

<sup>35</sup> Ex. 12: 50; Lev. 24: 22; Nu. 9: 14, 15: 15, 16, 29.

29; Zech. 7: 10; Mal. 3: 5), and the Law (Ex. 23: 9; Lev. 19: 33; Dt. 24: 17) protest bitterly against oppression inflicted upon the *Ger*. Solicitude for the resident alien, to the extent of loving him as much as though he were a fellow Hebrew, is the law of Lev. 19: 34. The same care for aliens appears in Ex. 22: 21, 23: 9; Dt. 10: 19.

Besides the two classes of the *Ger* and the *Nochri*, the Old Testament distinguishes between the various nationalities of foreigners. The Ammonites and the Moabites down to the tenth generation are denied the right to membership in the Hebrew community through marriage. In the case of the Edomites and Egyptians, however, their children of the third generation may marry members of the Hebrew community (Dt. 23: 4-9).

#### IN GREECE

The Greeks, too, like the Egyptians and like other races in antiquity, assumed a superiority to all other people. Strangers were looked upon as barbarians. Stranger, barbarian and enemy were often synonymous with the Greeks (and with the Romans also, as we shall see in the next chapter). Strangers were regarded as having been ordained and intended by nature to be the slaves of the Greeks with no rights whatsoever. The adoption of any method to carry out this intention, be it of a forcible or a deceitful nature, was assumed justifiable in the eyes of the gods.<sup>36</sup>

In the time of Homer, piracy and theft from foreigners were not restrained by law. These two crimes were not even regarded as immoral and anti-social in case the victim was a foreigner.<sup>37</sup> The divine law believed to be promulgated by Zeus was only for the Greek race. Foreigners, therefore, had no means of judicial redress. The only means of redress was by reprisal or self-help.<sup>38</sup>

Patriotism and keen jealousy of foreign interference occasioned mutual distress and an unbending spirit of opposition. It frequently led to keen strife and obstinate wars. Thus a rigid exclusiveness prevailed.

About two or three centuries later, especially in the age of Hesiod, the judicial system had advanced considerably. The processes of law were compulsory. Witnesses were produced. The statements of both parties and witnesses were made under oath. Also the foreigner was permitted to bring, in some cases at least, actions against citizens.<sup>39</sup>

The growth of commerce made it desirable that foreigners, too, should be able to collect their debts. Again, some security to person and property of

<sup>36</sup> Phillipsen, *op. cit.*, Vol. I, p. 30 ff.

<sup>37</sup> R. J. Bonner, Administration of Justice in the age of Homer, *Classical Philology*, Vol. VI, p. 12 ff. Though Homer often says that strangers and the poor came from Zeus, and that suppliants were under his special protection (*The Odyssey*, 6: 207 ff; 14: 508; 7: 165; 7: 181; 9: 270). Thus Zeus is often called *Xenics*, the Protector.

<sup>38</sup> H. G. Robertson, *The Administration of Justice in the Athenian Empire* (1924), p. 9.

<sup>39</sup> Bonner and Smith, *The Administration of Justice from Homer to Aristotle* (1930), p. 310 ff.

foreign merchants and travellers had to be procured. Hence there arose a very general practice of concluding treaties between friendly States. These treaties regulated the procedure for the trial of actions brought by the individual subjects of different States against one another, or by an individual against a foreign State, or by a foreign State against an individual subject.

As a result of these treaties, commerce was encouraged and friction which often leads to war was obviated. "Commerce," says Montesquieu, "necessarily remedies destructive prejudices." The narrow exclusiveness was constantly being broken down by the exigencies of commerce. International relationship was promoted and the status of the foreigner became somewhat tolerable.

Foreigners were placed under the protection of the *proxenoi*. The office of the *proxenus* was similar to the modern consulate and it is even regarded by some scholars as its earliest prototype.<sup>40</sup> As in our age, so also in the ancient world, the policy of consular service was based on reciprocity doctrines. It is said that nearly all the Greek republics had *proxenoi* in Egypt. *Proxenoi* were appointed either by the foreign government or by the protecting State. Athens followed the first rule, Sparta the second.

Of more interest to us is the special system of jurisdiction for foreigners which in ancient Greece received its most remarkable development. All resident aliens (*metoicoi*) were under the jurisdiction of special magistrates, the *polemarch*.<sup>41</sup> These magistrates tried civil suits in which foreigners were involved; but they had no authority to charge criminal actions. They also heard appeals from the decisions of the arbitrators. In criminal matters, foreigners were on the same footing as natives, except, when found guilty, the penalty inflicted was usually more severe. Sometimes such magistrates were appointed on the initiative of the particular national government in question; sometimes provisions were arranged to that effect by means of the treaties mentioned above. In some cases these judges exercised full judicial power in pronouncing decisions as to the matters in dispute; in others they appear to have merely investigated the points at issue, and submitted their results to the ordinary magistrates who were to deliver the final verdict.

The principle of *lex loci contractus* was sometimes applied in settlements of conflicting claims. Sometimes the *lex domicilii* of the defendant was followed. More often broad equitable principles were invoked in order to effect a fair reconciliation. Dr. Phillipson enumerates instances of such special judges and jurisdictions all of which prove the immiscibility of the alien in Greece, as in the rest of the ancient world, so far as his judicial status was concerned. Different laws, often his own national laws, administered by different judges, often selected from his own nationality, were applied to the foreigner.<sup>42</sup>

<sup>40</sup> Phillipson, *op. cit.*, Vol. I, p. 147 ff.

<sup>41</sup> Gilbert, *Greek Constitutional Antiquities* (1895), I, p. 174.

<sup>42</sup> Herodotus, 6: 42; Hitzig, *Allgriechische Staatsverträge über Rechtshilfe*, p. 28 ff; Phillipson, *op. cit.*, Vol. I, p. 192 ff.

## IN ROME

The Romans had less national pride and superiority complex than the Greeks both in regard to religion and to state matters. Their attitude toward foreigners was marked by less exclusiveness and greater liberality of a systematic character than that of the Greeks. Foreign religions and foreign gods were more readily admitted into the Roman Commonwealth. But concerning juridical capacity, it had to be sanctioned and regulated by means of explicit pacts and treaties.<sup>43</sup> With the development of Rome in other spheres of life, there was introduced gradual and continual relaxation of the early stringent exclusiveness.<sup>44</sup>

The ever-increasing intercourse and communication in warlike as well as in peaceful relationships tended to promote the adoption of various compromises. The institutions of *hospitum* and *clientela* were introduced. These institutions assured the hospitality of the Roman State either to an individual or to a collective body of citizens of a foreign State. A profound influence on conceptions and ideals of international conduct was soon exerted. A universal desire was fostered for entering into formal treaties of peace, of alliance, of commerce. The *Jus Civile*, Roman Civil Law, could not apply to people other than Romans. The institution of "recuperators" was established, to examine the disputes in which foreigners were involved. Later, further methods of adjusting the rights and duties of foreigners had to be found. Otherwise—and this was a danger of real importance in the ancient world—they would settle their controversies by armed strife. The Romans followed the Greeks, the Egyptians and other ancient peoples. A special jurisdiction was assigned to foreigners. Somewhat like the *polemarch* in Greece, the *praetor peregrinus*, a more permanent, a more comprehensive and efficacious jurisdiction was set up to meet the growing demands of foreign immigrants.<sup>45</sup> The exact date of the origin of the *praetor peregrinus* is not quite certain. It was apparently instituted around the middle of the 2nd century B.C. He applied the provisions of the *Jus Gentium*. This code consisted of a collection of rules, principles and customs of the various Italian tribes. Indeed those were "all the nations" whom the Romans had the means of observing and who sent successive swarms of immigrants to Roman soil. These rules, therefore, were accepted as "binding by all people." In case the provisions of the *Jus Gentium* were found inadequate or inoperative, the *Jus Originis*, the original, personal law of the foreigner was applied. Aliens were refused the enjoyment of the *Jus Civile*. As a result of this method, we meet in the same State, and at times in the same city, various communities each living under its own law. The Lombards lived under Lombard law, and the Romans under Roman law, etc. Later, in the days which followed the downfall of the Roman Empire, this

<sup>43</sup> Theodor Mommsen, *History of Rome* (1895), p. 199 ff.

<sup>44</sup> Phillipson, *op. cit.*, p. 213 ff.      <sup>45</sup> Maine, *op. cit.*, p. 51 ff.

differentiation of laws extended even to the various branches of the Germanic invaders. The Goths, the Franks, the Burgundians, each individual was subject to his own personal law while resident in the same country. Savigny summarizes this condition by saying that "it often happened that five men each under a different law would be found walking or sitting together."<sup>48</sup>

#### CONCLUSION

To summarize these pages, we come to the conclusion that the ancient world, beginning with the Egyptians and up to the Romans, never permitted members of other communities to enjoy the law of the State where they lived. On the other hand, absolute territorial sovereignty and law were not emphasized. Aliens had recourse to their own particular legal systems and customs. The ancient world concerned itself very little, if at all, with the task of effecting a reconciliation between personal and territorial laws. It is, therefore, in ancient history that we find the origin of the jurisdiction of extraterritoriality. There is, however, one fundamental difference between the régime of extraterritoriality in antiquity and in our age. While we consider it a great privilege to be able to live under our home law and be subject to our home judges during our stay in a foreign country, the foreigner in the early days of history sought on the contrary to be equally treated with the native of the State and to be subject to his law.

<sup>48</sup> F. C. von Savigny, *Private International Law*, Vol. 1, p. 116 ff.

## A COMPARATIVE STUDY OF LAWS RELATING TO NATIONALITY AT BIRTH AND TO LOSS OF NATIONALITY \*

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The comprehensive revision of the nationality laws of the United States, now being formulated in pursuance of an Executive Order issued by President Roosevelt on April 25, 1933, lends special interest and value at the present time to a comparative study of the laws of foreign states relating to nationality at birth and to the loss of nationality. The Executive Order referred to provides:

The Secretary of State, the Attorney General, and the Secretary of Labor are designated a committee to review the nationality laws of the United States, to recommend revisions, particularly with reference to the removal of certain existing discriminations, and to codify those laws into one comprehensive law for submission to Congress at the next session.

The task thus outlined proved to be of such magnitude that it was not possible to complete the proposed code in time for its presentation to the last session of Congress, but it is anticipated that it will be submitted to Congress shortly for appropriate action.

Nationality is a field in which a comparative study of the law is of special value because of the great complexity and the seemingly endless variety of problems that arise out of cases in which questions of nationality are involved, and because of the desirability of avoiding, as far as is practicable, unnecessary conflicts of law in this field. Conflict is, of course, inevitable in a field in which such a large number of separate entities legislate independently, with but limited regulation by accepted rules of international law. This very situation, however, makes a comparative study of the law the chief hope of progress in the direction of securing any degree of harmonious interlocking of the laws on this important subject.

The large number of naturalized citizens in the United States, its traditional policy on the question of expatriation, and the activities and far flung interests of American citizens abroad, with the consequent possible sources of irritation in our foreign relations arising out of the protection of such citizens, if our nationality laws unnecessarily come into conflict with the laws of other countries, render a study of foreign laws of peculiar importance in drafting a nationality code for the United States.

\* The writer desires to acknowledge his indebtedness to Mr. Richard W. Flournoy, Jr., at whose suggestion this study was undertaken, and who has been kind enough to make a number of valuable suggestions with respect to the text of this article.

The analysis which follows has reference only to statutory provisions on nationality. It does not, therefore, purport to furnish a complete picture of the laws of any given country with respect to the subjects included. Needless to say, in many foreign countries statutory gaps have been filled in by judicial decisions and by administrative regulations and interpretations, just as they have been to some extent in the United States. Nevertheless it is believed that a study of the statutory provisions of foreign laws will serve the essential purpose of such a comparative study, because of the fact that the basic rules of the laws of most of the countries involved are included in the statutes.<sup>1</sup>

### I. Nationality at Birth

#### JUS SOLI

*Unconditional.* The unconditional rule of *jus soli* obtains in twenty-one foreign countries. Of these thirteen are Latin American countries: Argentine Republic, Bolivia, Brazil, Chile, Cuba, Dominican Republic, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay, Venezuela.<sup>2</sup> Six of the others are members of the British Empire: Great Britain and Northern Ireland, Australia, Canada, Newfoundland, New Zealand, British India.<sup>3</sup>

<sup>1</sup> For an extensive and thorough tabular analysis of the nationality laws of the various states see Appendix No. 1 to the draft code on The Law of Nationality, Research in International Law, Harvard Law School, this JOURNAL, Vol. 23, Spl. Supp. (April, 1929).

<sup>2</sup> ARGENTINE REPUBLIC, Law No. 346, Oct. 8, 1869, Art. 1 (1), (3), (5), Richard W. Flournoy, Jr. and Manley O. Hudson, Editors, *A Collection of Nationality Laws* (1929), p. 10. (Page references given hereafter in *italic* following each provision of law refer to Flournoy and Hudson, unless otherwise indicated); BOLIVIA, Constitution of Oct. 17, 1880, Art. 31 (1), p. 45; BRAZIL, Constitution of 1934, Art. 106 (a), Ernest Hambloch, *Brazilian Constitution of 1934, together with new and revised version in English of the text of the Brazilian Constitution of 1891 as amended in 1926*, p. 43; CHILE, Constitution of Sept. 18, 1925, Art. 5, p. 170; CUBA, Constitution of Feb. 3, 1934, Art. 4 (1), *Gaceta Oficial de la República de Cuba*, edición extraordinaria, No. 10, Feb. 8, 1934, p. 3; DOMINICAN REPUBLIC, Constitution of June 20, 1929, Art. 8 (2), p. 217; ECUADOR, Constitution of Mar. 26, 1929, Art. 7, p. 221; GUATEMALA, Constitution of 1879 as revised in 1887, 1897, 1927, Art. 5 (1), p. 321; MEXICO, Constitution of 1917 as amended Jan. 18, 1934, Art. 30, A, I, III, Roman R. Millan, *Constitución Política de los Estados Unidos Mexicanos, con todas sus reformas ediciones hasta Febrero de 1934*, p. 24; Law of Nationality and Naturalization, Jan. 20, 1934, Art. 1 (I), (III), enclosure with Despatch No. 156, Jan. 26, 1934, from American Consul General, Mexico City, to Secretary of State; PARAGUAY, Constitution of Nov. 25, 1870, Art. 35 (1), p. 471; PERU, Constitution of April 9, 1933, Art. 4, *Constitución Política del Perú sancionada por el Congreso Constituyente de 1931*, Lima (1933), p. 3; URUGUAY, Constitution of May 18, 1934, Art. 65, *Proyecto de Constitución sancionada por la Convención Nacional Constituyente el 24 de Marzo de 1934, Publicación Oficial* (Official text of constitution which went into effect on May 18, 1934); VENEZUELA, Constitution of May 29, 1929, Art. 28 (1), p. 640.

<sup>3</sup> GREAT BRITAIN AND NORTHERN IRELAND, Nationality and Status of Aliens Act, 1914, as amended by Acts of 1918 and 1922, Secs. 1 (1) (a), (c), (2), p. 62; AUSTRALIA, Nationality Act, 1920-1925, Secs. 6 (1), (a), (c), (2), p. 82; CANADA, Naturalization Act of 1914, Sec. 3 (1) (a), (c), (2), p. 76; NEWFOUNDLAND, Consolidated Statutes, Third Series (1916), Art. 1 (1) (a), (c), (2), p. 137; NEW ZEALAND, British Nationality and Status of Aliens (in New

Two countries, Siam and Venezuela, have adopted the unconditional rule of *jus sanguinis* as well as that of *jus soli*.<sup>4</sup> The Kingdom of Saudi Arabia has adopted both rules, but with the important limitation on *jus soli* that children born in the country of foreign parents are Hejaz subjects only so long as they reside in the Kingdom.<sup>5</sup> The unconditional rule of *jus soli* forms a basic part of the United States law of nationality, having been taken over from the English common law.<sup>6</sup>

A number of countries, the laws of most of which are based principally on *jus sanguinis*, have the unconditional rule of *jus soli*, but combined with the privilege on the part of the person concerned, on attaining his majority, of rejecting the nationality of the place of his birth and of electing the nationality of his parents: Albania, Bulgaria, Cuba, Denmark, France, Morocco, Tunis, Greece, Iceland, Italy, Luxemburg, Norway, Persia, Portugal, El Salvador, Sweden, and Turkey.<sup>7</sup> Under the laws of most of these states, this election is dependent upon the submission of proof that the person retains the nationality of his parents which he acquired at birth according to the rule of *jus sanguinis*.

No country relies solely on the rule of *jus soli*, but in eleven countries, Argentine Republic, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Paraguay, and Uruguay, the provisions based on *jus sanguinis* are limited in scope to provisions including the following: That children born abroad of nationals may opt for the nationality of the parents (Argentine Republic, Costa Rica, Ecuador, Guatemala);<sup>8</sup>

Zealand) Act, 1928, Second Schedule, Secs. 1 (1) (a), (c), (2), p. 112; BRITISH INDIA, see Great Britain and Northern Ireland.

<sup>4</sup> SIAM, Nationality Law, April 10, 1913, Sec. 3 (3), p. 524; VENEZUELA, Const., Art. 28 (1), p. 640. <sup>5</sup> SAUDI ARABIA, Law of Sept. 4, 1926, Secs. 3, 9, p. 331.

<sup>6</sup> Law of April 9, 1866, as reenacted in Revised Statutes, 1878, Sec. 1992; Constitution of 1789, Amendments, Art. XIV, Sec. 1, pp. 576, 577. See *U. S. v. Wong Kim Ark* (169 U. S. 674), holding that the rule embodied in Sec. 1 of the Fourteenth Amendment is merely declaratory of the common law rule of *jus soli*.

<sup>7</sup> ALBANIA, Civil Code, April 1, 1929, Art. 6 (3), p. 5; BULGARIA, Law of Dec. 31, 1903, as amended on Jan. 12, 1908, Dec. 8, 1911, and July 24, 1924, Art. 5 (3), p. 163; CUBA, Const., Art. 4 (1), *Gaceta Oficial*, *id.*, p. 3; DENMARK, Law of April 18, 1925, Sec. II, p. 214; FRANCE, Law of Aug. 10, 1927, Arts. III, IV, p. 246; MOROCCO, Decree of Nov. 8, 1921, Art. 1, p. 291; TUNIS, Law of Dec. 20, 1923, Arts. 1, 2, 10, p. 293; GREECE, Law No. 391 of Oct. 29, 1856, as amended by the Decree Law of Sept. 13, 1926, confirmed by the Decree of Aug. 12, 1927, Art. 14 (e), (f), p. 315; ICELAND, Law of June 15, 1926, Art. 2, p. 346; ITALY, Law of June 13, 1912, Art. 3 (3), p. 363; LUXEMBURG, Law of Jan. 27, 1878, Art. 2, p. 423; Law of Feb. 5, 1890, sole art., pp. 423, 424; NORWAY, Law of Oct. 3, 1924, Secs. 2, 11, pp. 454, 455; PERSIA, Law of Sept. 7, 1929, Arts. I (5), II, p. 473; Supplementary Nationality Act of Oct. 21, 1930, Arts. I, II, enclosure with despatch No. 199, Nov. 4, 1930, from American Minister, Teheran, Persia, to the Secretary of State; PORTUGAL, Civil Code of 1867, Art. 18 (2), p. 490; EL SALVADOR, Constitution of Aug. 13, 1886, Art. 42 (2), p. 517; SWEDEN, Law No. 130 of May 23, 1924, Art. 2, p. 546; TURKEY, Law of May 28, 1928, as amended by Law of April 6, 1929, Art. 4, p. 572.

<sup>8</sup> ARGENTINE REPUBLIC, Law No. 346, Art. I (3), p. 10; COSTA RICA, Constitution of

that children born abroad of nationals in the service of the country, or who have emigrated for political reasons, are nationals (Brazil, Bolivia, Chile, Ecuador, Paraguay);<sup>9</sup> that children born abroad of nationals become nationals by taking up residence in the parent's country (Bolivia, Chile, Colombia, Ecuador, Guatemala, Paraguay, Uruguay);<sup>10</sup> that children born abroad of nationals are nationals, provided they do not acquire, in accord with its laws, the nationality of the country where they are born (Dominican Republic, Guatemala).<sup>11</sup> In the other countries the rule of *jus sanguinis* applies, with certain limitations, to the extent of granting nationality to all children born abroad of fathers, nationals of a given country, and in some cases of either fathers or mothers, the latter rule obtaining in Chile, Cuba, Mexico, Paraguay, Peru, and Uruguay.<sup>12</sup>

*Conditional.* In addition to the countries having the unconditional rule of *jus soli*, the laws of the following countries are based principally on *jus soli*: Irish Free State,<sup>13</sup> Colombia, Costa Rica, Czechoslovak Republic, Honduras, Liberia (citizenship restricted to persons of Negro descent), Morocco, Netherland Colonies, Nicaragua, Panama, Union of South Africa. The inclusion in this group of Honduras and Nicaragua is perhaps somewhat doubtful as the basic rule in each is that those born in the country of nationals are nationals, and those born abroad of either father or a mother, a national of the country, may elect nationality.<sup>14</sup>

It is of interest to observe that, aside from Great Britain and the Irish Free State, the Czechoslovak Republic is the only European state to base its laws principally on *jus soli*.

The principal conditional rules of *jus soli* may, for convenience, be classified as follows:

Those persons are nationals who are,

Dec. 7, 1871, Art. 5 (2), p. 184; ECUADOR, Const., Art. 8 (2), p. 221; GUATEMALA, Const., Art. 5 (2), p. 321.

<sup>9</sup> BRAZIL, Const., Art. 106 (a), Hambloch, *op. cit.*, p. 43; BOLIVIA, Const., Art. 31 (2), p. 45; CHILE, Const., Art. 5 (2), p. 170; ECUADOR, Const., Art. 8 (1), p. 221; PARAGUAY, Const., Art. 35 (2), p. 471.

<sup>10</sup> BOLIVIA, Const., Art. 32 (1), p. 45; CHILE, Const., Art. 5 (2), p. 170; COLOMBIA, Const. of 1886, Art. 8 (1), (2), p. 179; ECUADOR, Const., Art. 8 (2), p. 221; GUATEMALA, Const., Art. 5 (2), p. 321; PARAGUAY, Const., Art. 35 (2), p. 471; URUGUAY, Const., Art. 65, *Proyecto de Const., op. cit.*

<sup>11</sup> DOMINICAN REPUBLIC, Const., Art. 8 (3), p. 217; GUATEMALA, Const., Art. 5 (2), p. 321.

<sup>12</sup> CHILE, Const., Art. 5, p. 170; CUBA, Const., Art. 4, *Gaceta Oficial, id.*, p. 3; MEXICO, Const., Art. 30 (A) (II), Millan, *op. cit.*, p. 24; PARAGUAY, Const., Art. 35, p. 471; PERU, Const., Art. 4, *Const. Política, id.*, p. 3; URUGUAY, Const., Art. 65, *Proyecto de Const., id.*

<sup>13</sup> Recently a comprehensive citizenship bill was introduced by the government in the Irish legislature. See enclosure with despatch No. 147, Dec. 3, 1934, from Legation at Dublin to Secretary of State. The only law at present in force concerning Irish citizenship is Art. 3 of the Constitution of Dec. 6, 1922.

<sup>14</sup> HONDURAS, Const., Sept. 10, 1924, Art. 7 (1), (2), p. 332; NICARAGUA, Const., Nov. 10, 1911, Art. 8 (1), (2), p. 448.

- (1) Born within the state of a parent or parents likewise born within the state, or of an alien parent or parents domiciled therein for a prescribed period at the time of the child's birth.
- (2) Born within the state of an alien parent or parents, if, on coming of age, nationality is elected according to a prescribed declaration.

The states having provisions of law falling under the first of these rules are: Albania, Irish Free State, Colombia, Free City of Danzig, Egypt, France, Morocco, Tunis, Honduras, Iraq, Netherland Colonies, Nicaragua, Persia, El Salvador, and Transjordan.<sup>15</sup> The second rule has been adopted by the following states: Afghanistan, Albania, Belgium, Belgian Congo, Bulgaria, Costa Rica, Egypt, Haiti, Iraq, Italy, Luxemburg, Mexico, Palestine, Panama, Spain and Turkey.<sup>16</sup>

There are certain other provisions in the laws of a number of states which may be classified as conditional rules of *jus soli*, though, strictly speaking, they are hardly true rules of *jus soli*, as they are not fundamentally derived from the real principle of *jus soli*, that is, that a natural bond of allegiance is created by the bare fact of birth on the soil of a state. The rules in-question may be summarized somewhat as follows:

Those persons born within the state are nationals,

- (1) If the nationality of no other state is acquired at birth (including those born of parents having no nationality).<sup>17</sup>

<sup>15</sup> ALBANIA, Civil Code, Art. 6 (1), p. 5; IRISH FREE STATE, Const., Art. 3, p. 130; COLOMBIA, Const., Art. 8 (1), p. 179; DANZIG, Law of May 30, 1922, Sec. 2, p. 209; EGYPT, Decree Law No. 19 of Feb. 27, 1929, Art. 6 (4), p. 228; FRANCE, Law of Aug. 10, 1927, Arts. I (2), II (1), pp. 245, 246; MOROCCO, Dahir of Nov. 8, 1921, sole art., Decree of Nov. 8, 1921, Art. 1, p. 291; TUNIS, Decree of Nov. 8, 1921, Art. 1, p. 293; HONDURAS, Const., Art. 7 (2), (3), p. 332; IRAQ, Law of Oct. 9, 1924, Art. 8 (b), p. 349; NETHERLAND COLONIES, Law of Feb. 10, 1910, as amended by Act of June 10, 1927, Art. 1 (1), p. 446; NICARAGUA, Const., Art. 8 (1), p. 448; PERSIA, Law of Sept. 7, 1929, Art. 1 (4), p. 473; EL SALVADOR, Const., Art. 42 (4), p. 517; TRANSJORDAN, Nationality Law of June 1, 1928, Sec. 6, Br. Parl. Papers, Misc. No. 14 (1931), Cmd. 3907, p. 36.

<sup>16</sup> AFGHANISTAN, Code of Aug. 1921, Sec. 85, p. 3; ALBANIA, Civil Code, Art. 6 (2), p. 6; BELGIUM, Law of Dec. 17, 1932, Arts. 6, 7, 8, 9, *Moniteur Belge*, Vol. 102, No. 352, Dec. 17, 1932, p. 6753; BELGIAN CONGO, Civil Code of 1892, Sec. 5, p. 42; PALESTINE, Order of July 14, 1925, Sec. 4 (1) (a), p. 152; BULGARIA, Law of Dec. 31, 1903, Art. 6, p. 163; COSTA RICA, Const., Art. 5 (3), p. 184; Law of May 13, 1889, Art. (6), p. 186; EGYPT, Decree Law No. 19, Art. 7, p. 228; HAITI, Law of Aug. 22, 1907, Art. 4, p. 328; IRAQ, Law of Oct. 9, 1924, Art. 9, p. 349; ITALY, Law of June 13, 1912, Art. 3 (1), (2), p. 363; LUXEMBURG, Civil Code of 1807, as revised by Law of Mar. 14, 1905, Sec. 9, p. 424; MEXICO, Law of Nationality, transitory provisions, Art. 3, *loc. cit.*; PANAMA, Constitution of Feb. 13, 1904, as revised by Act of Oct. 19, 1928, Art. 6, p. 458; SPAIN, Const. of Dec. 9, 1931, Art. 23 (2), *Gaceta de Madrid*, Número Extraordinario, Dec. 9, 1931, p. 3; Civil Laws of 1889, Art. 19, p. 538; TURKEY, Const. of May 24, 1924, Art. 88, p. 568.

<sup>17</sup> ALBANIA, Civil Code, Art. 4 (3), p. 5; AUSTRIA, Federal Law No. 285 of July 30, 1925, Sec. 14, p. 20; PALESTINE, Order of July 24, 1925, Sec. 3 (c), p. 152; CHINA, Revised Law of Nationality, Feb. 5, 1929, Art. 1 (4), p. 175; CZECHOSLOVAK REPUBLIC, Constitutional Law No. 236 of April 9, 1920, Sec. 2, p. 201; ESTONIA, Law No. 87 of Oct. 27, 1922, as amended by

- (2) If born of parents who are unknown, or whose nationality is unknown.<sup>18</sup>
- (3) In the case of a child found in the state, the presumption being that it was born there, until or unless the contrary is proved.<sup>19</sup>

It will be observed that, except with respect to the third of these rules, it is not the fact of birth within the state that furnishes the primary basis of the rules, but rather the absence of proof of the nationality of the persons affected according to the rules of *jus sanguinis* that would normally govern. Nationality is granted in these cases primarily as a necessary convenience upon the basis of an accidental combination of birth within the state with a void in the individual's title to nationality under the rules of *jus sanguinis*.

### JUS SANGUINIS

It appears that the laws of seven states are based solely on *jus sanguinis*: Finland, Germany, Latvia, Lithuania, Rumania, Russia and Switzerland.<sup>20</sup>

Decree of Oct. 26, 1934, Sec. 2 (10), enclosure with despatch No. 231, Nov. 8, 1934, from American Legation at Tallinn to Secretary of State; GREATER LEBANON, Order No. 15/S of Jan. 19, 1925, Art. 1 (2), p. 298; SYRIA, Order No. 16/S of Jan. 19, 1925, Art. 1 (2), p. 301; GREECE, Law No. 391, Art. 14 (2), p. 315; HUNGARY, Law of Dec. 20, 1879, Art. 19 (1), p. 339; ITALY, Law of June 13, 1912, Art. 1 (3), p. 363; JAPAN, Law No. 66 of March 1899, as revised by Law No. 27, of Mar. 1916, and Law No. 19 of July, 1924, effective from Dec. 1, 1924, Art. 4, p. 382; TURKEY, Law of May 28, 1928, Art. 2 (b), p. 570.

<sup>18</sup> ALBANIA, Civil Code, Art. 4 (3), p. 5; BELGIUM, Law of Dec. 17, 1932, Art. 1 (2), *Moniteur Belge*, id., p. 6783; BELGIAN CONGO, Civil Code of 1892, Sec. 4 (1), p. 42; PALESTINE, Order of July 24, 1925, Sec. 3 (c), p. 152; BULGARIA, Law of Dec. 3, 1903, Art. 5 (2), p. 163; CHINA, Rev. Law, Feb. 5, 1929, Art. 1 (4), p. 175; COSTA RICA, Law of May 13, 1889, Art. 1 (4), p. 184; EGYPT, Decree Law No. 19, Art. 6 (3), p. 228; FRANCE, Law of Aug. 10, 1927, Art. 1 (7), p. 245; GREATER LEBANON, Order No. 15/S, Art. 1 (3), p. 298; SYRIA, Order No. 16/S, Art. 1 (3), p. 301; GREECE, Law No. 391, Art. 14 (c), p. 315; ITALY, Law of June 13, 1912, Art. 1 (3), p. 363; JAPAN, Law No. 66, Art. 4, p. 382; MONACO, Civil Code of Nov. 6, 1913, Art. 8 (2), p. 437; NETHERLAND COLONIES, Law of Feb. 10, 1910, Art. 1 (2), p. 446; PERSIA, Law of Sept. 7, 1929, Art. 1 (3), p. 473; POLAND, Law of Jan. 20, 1920, Art. 5, p. 480; PORTUGAL, Civil Code of 1867, Art. 18 (4), p. 490 (Art. 7 of the new Portuguese Constitution of Mar. 19, 1933, provides, "The Civil Law determines how the quality of Portuguese citizens is acquired and lost." *Constitution Politique de la République Portugaise*, Lisbonne, 1934); SPAIN, Const., Art. 23 (3), *Gaceta de Madrid*, id., p. 3; TURKEY, Law of May 28, 1928, Art. 2 (a), p. 570; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 9, p. 391.

<sup>19</sup> ALBANIA, Civil Code, Art. 4 (3), p. 5; BELGIUM, Law of Dec. 17, 1932, Art. 1 (2), *Moniteur Belge*, id., p. 6783; BELGIAN CONGO, Civil Code of 1892, Sec. 4 (2), p. 42; EGYPT, Decree Law No. 19, Art. 6 (3), p. 228; ITALY, Law of June 13, 1912, Art. 1 (3), p. 363; LYBIA, Law No. 1013 of June 26, 1927, Art. 29, p. 379; MEXICO, Law of Nationality, Jan. 20, 1934, Art. 55, loc. cit.; PERU, Const., Art. 4, *Const. Política*, id., p. 3.

<sup>20</sup> FINLAND, Constitution of July 17, 1919, Art. 4, p. 237; Law of June 17, 1927, Sec. 2, p. 239; GERMANY, Law of Nationality of July 22, 1913, Secs. 4, 5, p. 306; LATVIA, Law of June 2, 1927, Art. 7, p. 409; LITHUANIA, Provisional Law of Jan. 9, 1919, Sec. 1 (d), (f), p. 417; RUMANIA, Law of Feb. 23, 1924, Art. 2 (a), (b), p. 497; RUSSIA, Regulation concerning citizenship of U. S. S. R. of April 22, 1931, Sec. 7, enclosure with Despatch No. 7704, May 8,

The laws of the following states may be said to be based virtually on *jus sanguinis*, as they include only rules of *jus soli* falling under the second group of conditional rules of *jus soli* set forth above: Austria, China, Free City of Danzig, Estonia, Hungary, Japan, Monaco, Netherlands, Poland, Yugoslavia.<sup>21</sup> In addition to the foregoing states having laws based entirely, or almost entirely, on *jus sanguinis*, thirty-one others have laws based principally on that rule.<sup>22</sup>

Of these *jus sanguinis* states, by far the larger number follow the rule of descent through the father, thirty-three having the unconditional rule that nationality is acquired by birth of a father who is a national, regardless of the place of birth.<sup>23</sup> Fourteen others have conditional rules under which nationality is acquired by descent from the father.<sup>24</sup>

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1931, from American Minister, Riga, Latvia, to Secretary of State; SWITZERLAND, Civil Code of Dec. 10, 1907, Arts. 270, 324 (1), 325 (1), p. 560; Federal Constitution of May 29, 1874, as amended May 20, 1928, Art. 24, p. 556.

<sup>21</sup> AUSTRIA, Fed. Law No. 285, Secs. 5 (1), 13, 14, pp. 19, 20; CHINA, Rev. Law, Feb. 5, 1929, Arts. 1 (1), (2), (3), (4), 2 (2), (3), p. 175; DANZIG, Law of May 30, 1922, Secs. 1, 2, 3, p. 202; ESTONIA, Law No. 87, Sec. 2 (10), *loc. cit.*; Law No. 87, Sec. 2 (3), (4), (6), p. 232; HUNGARY, Law of Dec. 20, 1879, Arts. 19 (1), 3, pp. 337, 339; JAPAN, Law No. 66, Arts. 1, 3, 4, 5 (3), 6, p. 382; MONACO, Civil Code, Art. 8 (2), (1), pp. 436, 437; NETHERLANDS, Law of Dec. 12, 1892, as amended by acts of July 8, 1907, Feb. 10, 1910, July 15, 1910, and Dec. 31, 1920, Art. 1 (d), (a), (b), (c), p. 441; POLAND, Law of Jan. 20, 1920, Arts. 5, 6, p. 480; YUGOSLAVIA, Law of Nationality of Sept. 21, 1928, Arts. 9, 7 (a), 8, pp. 390, 391.

<sup>22</sup> Afghanistan, Albania, Belgium, Belgian Congo, Bulgaria, Denmark, Dodecanese Islands, Egypt, Ethiopia, France, Greece, Haiti, Iceland, Iraq, Italy, Liechtenstein, Luxembourg, Lybia, Norway, Palestine, Persia, Portugal, El Salvador, Saudi Arabia, Spain, Sweden, Syria, Tunis, Greater Lebanon, Transjordan, Turkey.

<sup>23</sup> AFGHANISTAN, Code, Sec. 84, p. 3; ALBANIA, Civil Code, Art. 4 (1), p. 5; AUSTRIA, Fed. Law No. 285, Secs. 5 (1), 13, pp. 19, 20; BELGIUM, Law of Dec. 17, 1932, Art. 1 (1), *Moniteur Belge*, *id.*, p. 6783; CHINA, Rev. Law, Feb. 5, 1929, Art. 1 (1), (2), p. 175; COSTA RICA, Law of May 13, 1889, Art. 1 (1), p. 185; DANZIG, Law of May 30, 1922, Sec. 1, p. 209; DENMARK, Law of April 18, 1925, Sec. 1, p. 214; EGYPT, Decree Law No. 19, Art. 6 (1), p. 227; ESTONIA, Law No. 87, Sec. 2 (3), p. 232; FRANCE, Law of Aug. 10, 1927, Art. 1 (1), p. 245; TUNIS, Decree of June 19, 1914, sole art. (2), p. 293; GREATER LEBANON, Order No. 15/S, Art. 1, p. 298; SYRIA, Order No. 16/S, Art. 1 (1), p. 301; GERMANY, Law of Nationality, July 22, 1913, Sec. 4, p. 306; GREECE, Law No. 391, Art. 14, p. 315; HAITI, Law of Aug. 22, 1907, Art. 2 (1), p. 328; ICELAND, Law of June 15, 1926, Art. 1, p. 346; ITALY, Law of June 13, 1912, Art. 1 (1), p. 363; LYBIA, Law No. 1013, Art. 29, p. 379; JAPAN, Law No. 66, Art. 1, p. 382; MONACO, Civil Code, Art. 8 (1), p. 436; NETHERLANDS, Law of Dec. 12, 1892, Art. 1 (a), (b), p. 441; NORWAY, Law of Aug. 8, 1924, Sec. 1, p. 453; PERSIA, Law of Sept. 7, 1929, Art. 1 (2), p. 473; POLAND, Law of Jan. 20, 1920, Art. 5, p. 480; RUMANIA, Law of Feb. 23, 1924, Art. 2 (a), p. 497; SIAM, Nationality Law, April 10, 1913, Sec. 3 (1), p. 524; SWEDEN, Law No. 130, Art. 1, p. 546; SWITZERLAND, Civil Code, p. 560; TRANSJORDAN, Nationality Law of June 1, 1928, Sec. 6, *loc. cit.*, p. 36; TURKEY, Const., Art. 88, p. 568; VENEZUELA, Const., Art. 28 (2), p. 640.

<sup>24</sup> PALESTINE, Order of July 24, 1925, Sec. 3 (a), (b), p. 152; IRAQ, Law of Oct. 9, 1924, as amended by Iraq Nationality Law Amendment of 1928, Arts. 2, 8, pp. 349, 360; PANAMA, Const., Art. 6, p. 453; GREAT BRITAIN AND NORTHERN IRELAND, Nationality and Status of Aliens Act, Sec. 1 (1) (b), p. 62; AUSTRALIA, Nationality Act, 1920-1925, Sec. 6 (1) (b),

In neither of these cases does the number include the states in which nationality is acquired by descent from either or both parents. In thirteen countries the unconditional rule of descent from either or both parents obtains.<sup>25</sup> One cannot be certain in all these countries, however, that the law on this point includes the mother as, for example, the law of Panama refers to "Panaman parents," but it has been interpreted to be limited to descent from the father.<sup>26</sup> The laws of twenty-two states contain conditional rules under which nationality is acquired at birth by descent from either or both parents.<sup>27</sup> Until the enactment of the law of May 24, 1934, the law of the United States provided that all children born abroad of fathers nationals of the United States acquired the nationality of the father at birth, subject to the proviso that this right of nationality should not "descend to children whose fathers never resided in the United States."<sup>28</sup> Under the terms of Section 1 of the law of May 24, 1934, amending Section 1993 of the

p. 89; CANADA, Naturalization Act of 1914, Sec. 3 (1) (b), p. 76; NEWFOUNDLAND, British Nationality and Status of Aliens Act, 1929, Sec. 1, p. 144; NEW ZEALAND, British Nationality and Status of Aliens (in New Zealand) Act, 1928, Second Schedule, Sec. 1 (1) (b), p. 112; UNION OF SOUTH AFRICA, Act No. 40, Sec. 1, p. 128; GUATEMALA, Const., Art. 5 (2), p. 321; LIBERIA, Law of Feb. 8, 1922, Secs. 67, 74, pp. 413, 414; MEXICO, Const. of 1917, Art. 30, Millan, *op. cit.*, p. 24; PARAGUAY, Const., Art. 35 (3), p. 471; EL SALVADOR, Const., Art. 42 (3), p. 516.

<sup>25</sup> BULGARIA, Law of Dec. 31, 1903, Arts. 5 (1), 6, 7, pp. 162-163; ETHIOPIA, Law of July 22, 1930, Sec. 1, enclosure with Despatch No. 503, Aug. 12, 1930, from Minister and Consul General at Addis Ababa to Secretary of State; FINLAND, Const., Art. 4, p. 237; KINGDOM OF SAUDI ARABIA, Law of Sept. 24, 1926, Sec. 2, p. 331; HUNGARY, Law of Dec. 20, 1879, Art. 3, p. 337; LATVIA, Law of June 2, 1927, Art. 7, p. 409; LIECHTENSTEIN, Law of May 14, 1864, Art. 1 (1), *Liechtensteinisches Landes-Gesetzblatt*, No. 3, May 14, 1864; LITHUANIA, Provisional Law of Jan. 9, 1919, Sec. 1 (d), p. 417; LUXEMBURG, Civil Code, Art. 10, p. 420; RUSSIA, Regulation, April 22, 1931, Sec. 7, *loc. cit.*; SPAIN, Const., Art. 23 (1), *Gaceta de Madrid*, *id.*, p. 3; TURKEY, Law of May 28, 1928, Art. 1, p. 570; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 7 (a), p. 390.

<sup>26</sup> Resolution No. 428, Oct. 14, 1933, enclosure with Despatch No. 10, Oct. 17, 1933, from American Minister, Panama, to Secretary of State.

<sup>27</sup> (1) *Wherever born*: BELGIUM, Law of Dec. 17, 1932, Arts. 6 (2), 8 (2), *Moniteur Belge*, *id.*, p. 6784; PARAGUAY, Const., Art. 35, p. 471; PERU, Const., Art. 4, *Const. Política*, *id.*, p. 3; URUGUAY, Const., Art. 65, *Proyecto de Const.*, *id.*

(2) *Born abroad*: ARGENTINE REPUBLIC, Law No. 346, Art. 1 (2), p. 10; BOLIVIA, Constitution, Arts. 31 (2), 32 (1), p. 45; BRAZIL, Const., Art. 106, Hambloch, *op. cit.*, p. 43; CHILE, Const., Art. 5, p. 170; COLOMBIA, Const., Art. 8 (1), (2), p. 179; COSTA RICA, Const., Art. 5 (2), p. 184; CUBA, Const., *Gaceta Oficial*, *id.*, p. 3; DOMINICAN REPUBLIC, Const., Art. 8 (3), p. 216; ECUADOR, Constitution, Art. 8, p. 220; MEXICO, Const., Art. 30 (A) (II), Millan, *op. cit.*, p. 24; Law of Nationality, Jan. 20, 1934, Art. 1 (II), *loc. cit.*; NETHERLAND COLONIES, Law of Feb. 10, 1910, Art. 1 (4), (5), p. 446; NICARAGUA, Const., Art. 8 (2), p. 448.

(3) *Born within the state*: Belgian Congo, Civil Code of 1892, Sec. 1, p. 42; COLOMBIA, Const., Art. 8 (1), p. 179; DANZIG, Law of May 30, 1922, Sec. 1, p. 209; HONDURAS, Const., Art. 8, p. 332; NICARAGUA, Const., Art. 8, p. 448; PORTUGAL, Civil Code of 1867, Art. 18, p. 490.

<sup>28</sup> Law of Feb. 10, 1855, as reenacted in Rev. Stats. 1878, Sec. 1993, p. 577.

Revised Statutes, however, which was intended to create equality between men and women in the transmission of nationality to children born abroad of United States nationals, nationality is acquired at birth by "any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child, is a citizen of the United States," subject to the proviso that the "rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child."<sup>29</sup> This section contains the added limitation, in cases where one of the parents is an alien, that the "right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."<sup>30</sup>

It may be noted that nine countries have specific conditional rules of *jus sanguinis* under which nationality is acquired by descent from the mother.<sup>31</sup> The unconditional rule of descent from the mother exists only where the law provides for descent from either or both parents.<sup>32</sup>

It may be observed finally with respect to these rules of *jus soli* and of *jus sanguinis* that of the seventy-nine countries, not including the United States, embraced in this study (self-governing dominions, and some colonies and protectorates having separate nationality laws being included), forty-eight follow principally the rule of *jus sanguinis*, twenty-nine that of *jus soli*, while in two, Siam and Venezuela, the laws are based equally on the two rules. It may be recalled also that *jus sanguinis* rules are insignificant in the laws of but eleven countries.<sup>33</sup> The British Empire and the two Americas form the stronghold of the law of *jus soli*, the laws of all other countries except Siam, the Czechoslovak Republic, Liberia, Morocco, the Netherland Colonies, and the Kingdom of Saudi Arabia, being predominantly *jus sanguinis*. It is not of course intended to suggest that a mathematical count of the countries adhering respectively to the rules of *jus soli* and *jus*

<sup>29</sup> 48 Stat. 797.

<sup>30</sup> *Ibid.* A question having arisen as to the proper construction of this provision, the Attorney-General ruled in an opinion of July 21, 1934 "that a child born abroad subsequent to May 24, 1934, one of whose parents is a citizen of the United States and the other an alien, acquires American citizenship at birth. Such citizenship is subject to being divested if such child thereafter fails to comply with the two conditions described in the Act, which must be regarded as conditions subsequent and not as conditions precedent."

<sup>31</sup> (1) *Wherever born*: ALBANIA, Civil Code, Art. 4 (2), p. 5; CHINA, Rev. Law, Feb. 5, 1929, Art. 1 (3), p. 175; ITALY, Law of June 13, 1912, Art. 1 (2), p. 363; JAPAN, Law No. 65, Art. 3, p. 382; LATVIA, Law of June 2, 1927, Art. 7, p. 409.

(2) *Born abroad*: MEXICO, Law of Nationality, Jan. 20, 1934, Art. 21 (III), *loc. cit.*; SPAIN, Royal Decree of Nov. 17, 1852, Art. 1, p. 530.

(3) *Born within the state*: FRANCE, Law of Aug. 10, 1927, Art. I (3), p. 245; SWITZERLAND, Const., Art. 44, p. 556.

<sup>32</sup> See note 25.

<sup>33</sup> See notes 8, 9, 10 and 11.

*sanguinis* affords a conclusive measure of the comparative influence of these rules in international relations. Because of the wide variations in area and population, and in the industrial and political importance of the countries under consideration, a comparison of the population and trade of the two groups of countries may offer a further indication of the respective importance of the two rules. Other things being equal, the population and foreign trade of any given country, or group of countries, furnish a fairly accurate barometer of the extent to which its nationals may be found participating in foreign travel and intercourse, and hence of its comparative importance in an evaluation of the influence of the rules of nationality to which it adheres.

Of the 1,767,038,000 persons making up the total population of the seventy-eight countries included in this study whose laws are based principally on one or the other of the two rules, 1,106,832,000, or approximately 62.5%, live in *jus sanguinis* countries, and 660,206,000, or 37.5%, in *jus soli* countries.<sup>34</sup> Even in evaluating these figures certain limitations need to be kept in mind, as, for example, the fact that 450,000,000, or approximately 40%, of the *jus sanguinis* population is contributed by China. The extensive existing limitations on Chinese immigration, taken together with the fact that Chinese trade makes up but 3% of the total trade of the *jus sanguinis* countries, indicate clearly that the influence of China in contributing to or resolving problems of nationality is not proportionate to the size of its population.

The preponderant extent of the rule of *jus sanguinis* indicated both by the number of countries adhering principally to it, and by the population of these countries, is not borne out by the comparative foreign trade of the two groups. The total of approximately fifty billion dollars in foreign trade, for the year 1930,<sup>35</sup> of the countries under consideration was almost equally divided between the *jus sanguinis* and the *jus soli* countries. Nevertheless, it is a rather striking fact that the seventeen countries<sup>36</sup> whose laws are based almost exclusively on *jus sanguinis* have approximately 48% of the total population of the countries studied, and furnish more than 27% of the total trade, while the eleven countries<sup>37</sup> with negligible rules of *jus sanguinis* have but 4½% of the population, and contribute only 5½% of the total trade.

Although the fact that the total foreign trade of the *jus soli* countries approximately equals that of those following *jus sanguinis* demonstrates the necessity of caution in drawing conclusions on the basis of the above facts, it seems apparent that the rule of *jus sanguinis* is considerably more exten-

<sup>34</sup> These figures represent the latest official estimate taken from the *Statistical Year-Book of the League of Nations*, 1933-1934, pp. 18-23. It may be noted that this year book gives a total world population (estimated) of 2,041,600,000. The difference between that figure and the total population of the countries included in this study is made up chiefly by colonies for which separate nationality laws were not available.

<sup>35</sup> *Ibid.*, pp. 194-195. The year 1930 has been used here as representing a more normal condition of foreign trade than more recent years.

<sup>36</sup> See notes 20 and 21.

<sup>37</sup> See notes 8, 9, 10 and 11.

sive and has much greater influence in the determination of nationality than the rule of *jus soli*. The validity of this statement becomes more apparent if the extent be recalled to which the countries with laws based principally on *jus soli* include provisions based on *jus sanguinis*. The problem created by this situation is rendered even more significant when it is noted that most of the *jus soli* countries are new countries, and, until recently, countries of extensive immigration. As most of the countries of emigration follow the rule of *jus sanguinis*, the result is a multiplication of instances of dual nationality. Although the mere fact of a widespread status of dual nationality acquired at birth, with such a status continuing for a number of years during minority does not, in itself, present an especially serious problem, the urgent necessity to which this situation points is the development of sound rules for the termination of dual nationality at an age short of that at which competing claims by two countries to the allegiance of the same man may be calculated to cause serious friction.

*Illegitimate children.* This is a minor, but none the less important phase of the law of nationality. It is a matter which has never been directly covered by legislation in the United States, but the Department of State has for a long time followed the rule that an illegitimate child follows the nationality of the mother, in the absence of legitimation according to law by the father. It is significant to observe that the same *lacuna* exists in the statutory law of about half the states studied.

The laws of approximately thirty countries provide for the nationality of illegitimate children, in the absence of acknowledgment or legitimation, and in all but Turkey such children follow the mother's nationality in the absence of any act legally establishing filiation.<sup>38</sup> Turkish law is believed to be

<sup>38</sup> ALBANIA, Civil Code, Art. 4 (2), p. 5; AUSTRIA, Federal Law No. 285, Sec. 5 (1), p. 19; BELGIUM, Law of Dec. 17, 1932, Art. 2, *McNiteur Belge*, *id.*, p. 6783; BELGIAN CONGO, Civil Code of 1892, Sec. 4 (3), p. 42; BULGARIA, Law of Dec. 31, 1903, Art. 5 (1), p. 162; CHINA, Rev. Law, Feb. 5, 1929, Art. 2 (3), p. 175; COSTA RICA, Law of May 13, 1889, Art. 1 (2), p. 136; DANZIG, Law of May 30, 1922, Sec. 1, p. 209; DENMARK, Law of April 18, 1925, Sec. 1, p. 214; EGYPT, Decree Law No. 19, Art. 6 (2), p. 226; ESTONIA, Law No. 87, Sec. 2 (4), p. 232; ETHIOPIA, Law of July 22, 1930, Sec. 8, *loc. cit.*; FINLAND, Law of June 17, 1927, Sec. 2, p. 240; FRANCE, Law of Aug. 10, 1927, Arts. I (4), (5), (6), II (2), p. 246; TUNIS, Decree of June 19, 1914, sole art. (2), p. 223; GREATER LEBANON, Order No. 15/S, Art. 2, p. 229; SYRIA, Order No. 16/S, Art. 2, p. 301; GERMANY, Law of Nationality, July 22, 1913, Sec. 5, p. 306; GREECE, Law No. 391, Art. 14 (b), p. 315; HAITI, Law of Aug. 22, 1907, Art. 2 (2), p. 328; HUNGARY, Law of Dec. 20, 1879, Art. 3, p. 337; ICELAND, Law of June 15, 1926, Art. 1, p. 346; ITALY, Law of June 13, 1912, Art. 2, p. 363; LYBIA, Law No. 1013, p. 379; JAPAN, Law No. 66, Arts. 5 (3), 6, p. 382; LITHUANIA, Provisional Law, Jan. 9, 1919, Sec. 1 (f), p. 417; MONACO, Civil Code, Art. 8 (1), p. 437; NETHERLANDS, Law of Dec. 12, 1892, Art. 1 (c), p. 441; NORWAY, Law of Aug. 5, 1924, Sec. 1, p. 453; POLAND, Law of Jan. 20, 1920, Art. 5, p. 479; PORTUGAL, Civil Code of 1867, Art. 18 (1), (3), p. 491; RUMANIA, Law of Feb. 23, 1924, Art. 2 (b), p. 497; EL SALVADOR, Const., Art. 42 (2), (3), p. 516; SIAM, Nationality Law of April 10, 1913, Sec. 3 (2), p. 524; SWEDEN, Law No. 320, Art. 1, p. 544; SWITZERLAND, Civil Code, Art. 324 (1), p. 560; TURKEY, Law of May 28, 1928, Art. 2 (c), p. 570; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 7, p. 390.

unique in providing that the child may follow the father's nationality in the absence of any provision concerning legal establishment of the relationship.<sup>39</sup> The laws of only ten states contain simply the provision that the illegitimate child follows the nationality of its mother, unaccompanied by any provisions concerning legitimation by the father (Denmark, Finland, Tunis, Iceland, Lithuania, Norway, Portugal, El Salvador, Siam, Sweden). The majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality.<sup>40</sup> Although in the law of the United States there is no statutory rule providing specifically for cases of this kind, the Department of State in practice follows this majority rule. Under the rule as applied by the Department, the question of legitimation is controlled by the law of the domicile of the father.

In the following states, in case of legal acknowledgment or recognition, the nationality of the parent whose relationship is first legally established prevails, unless that of both is established by the same instrument, or simultaneously, in which case the nationality of the father takes precedence: Belgian Congo, Bulgaria, France, Greater Lebanon, Syria, Japan, Monaco.<sup>41</sup>

#### TERMINATION OF DUAL NATIONALITY ACQUIRED UNDER *JUS SOLI* OR *JUS SANGUINIS*

One of the more important sources of conflict in nationality laws is that of dual nationality acquired at birth, the child acquiring the nationality of the country in which he is born under *jus soli*, and that of his parent, or parents, under *jus sanguinis*. Such a person becomes subject to the duties and obligations imposed by the laws of two different countries, in the absence of provision for the termination of the status, and may be called upon to perform military service for a country to which he feels no real allegiance. It is significant to note, therefore, that only thirty-three countries provide a method for the termination of this status of dual nationality. Of these,

<sup>39</sup> See note 38 (Turkey).

<sup>40</sup> ALBANIA, Civil Code, Art. 5, *¶* 5; AUSTRIA, Fed. Law No. 285, Sec. 5 (1), *p. 19*; CHINA, Rev. Law, Feb. 5, 1929, Art. 2 (2), *p. 175*; COSTA RICA, Law of May 13, 1889, Art. 1 (3), *p. 186*; DANZIG, Law of May 30, 1922, Sec. 3, *p. 209*; EGYPT, Decree Law No. 19, Art. 6 (2), *p. 226*; ESTONIA, Law No. 87, Sec. 2 (6), *p. 232*; ETHIOPIA, Law of July 22, 1930, Secs. 8, 9, *loc. cit.*; GERMANY, Law of Nationality of July 22, 1913, Sec. 5, *p. 306*; GREECE, Law No. 391, Art. 14 (d), *p. 315*; HAITI, Law of Aug. 22, 1907, Art. 2 (2), *p. 328*; HUNGARY, Law of Dec. 20, 1879, Art. 4, *p. 337*; ITALY, Law of June 13, 1912, Art. 2, *p. 363*; NETHERLANDS, Law of Dec. 12, 1892, Art. 1 (a), *p. 441*; SWITZERLAND, Civil Code, Art. 325 (1), *p. 560*; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 8, *p. 390*.

<sup>41</sup> BELGIUM, Law of Dec. 17, 1952, Art. 2, *Mémiteur Belge, id.*, *p. 6784*; BELGIAN CONGO, Civil Code of 1892, Sec. 4 (3), *p. 42*; BULGARIA, Law of Dec. 31, 1903, Art. 5 (1), *p. 162*; FRANCE, Law of Aug. 10, 1927, Art. I (4), (5), (6), Art. II (2), *p. 246*; GREATER LEBANON, Order No. 15/S, Art. 2, *p. 299*; SYRIA, Order No. 16/S, Art. 2, *p. 301*; JAPAN, Law No. 66, Arts. 5 (3), 6, *p. 382*; MONACO, Civil Code, Art. 8 (1), *p. 437*; RUMANIA, Law of Feb. 23, 1924, Art. 2 (b), *p. 497* (legitimation may be effected equally by fathers or mothers).

twenty-two are countries whose laws are based principally on *jus sanguinis*.<sup>42</sup> Ten of the countries whose laws are based chiefly on *jus soli* have provided a means for the termination of dual nationality thus acquired at birth, seven of them being members of the British Empire.<sup>43</sup> In all these countries the law provides, in one form or another, for the election of one of the two nationalities by the making of a declaration of election on attaining majority. The Kingdom of Saudi Arabia limits its unqualified law of *jus soli* with the rule that children born in the kingdom of foreigners are Hejaz subjects only so long as they reside in the kingdom.<sup>44</sup>

It is sometimes erroneously stated that children born abroad of an American national lose their American nationality if they fail to elect it upon attaining majority. There is no provision in United States law for such termination of dual nationality acquired at birth. The notion that there is arises out of a misapprehension of the effect of the provisions contained in Section 6 of the Act of March 2, 1907.<sup>45</sup> A child failing to take the steps required by this section loses merely the right to diplomatic protection, such failure having no effect upon his citizenship. Neither is there any provision in United States law permitting children acquiring dual nationality by birth in the United States of alien parents to elect the nationality of the parents.

<sup>42</sup> ALBANIA, Civil Code, Art. 10, p. 6; PALESTINE, Order of July 24, 1925, Sec. 16, p. 156; BULGARIA, Law of Dec. 31, 1903, Art. 5, p. 162; DENMARK, Law of Mar. 25, 1871, Sec. 1, Law of April 18, 1925, Art. VI, p. 214; FINLAND, Law of June 17, 1927, Sec. 2, p. 240; FRANCE, Law of Aug. 10, 1927, Art. II (1), (2), pp. 245, 247; MOROCCO, Decree of Nov. 8, 1921, Art. 1, p. 291; TUNIS, Law of Dec. 20, 1923, Art. 2, p. 293; GREECE, Law No. 391, Art. 14 (e), p. 316; ICELAND, Law of June 15, 1926, Arts. 2, 6, p. 346; IRAQ, Law of Oct. 9, 1924, Art. 14, pp. 350, 360; ITALY, Law of June 13, 1912, Art. 7, p. 364; JAPAN, Law No. 66, Art. 20, p. 384; LUXEMBURG, Law of Jan. 27, 1878, pp. 423-424; NORWAY, Law of Aug. 8, 1924, Secs. 2, 9, p. 454; PERSIA, Law of Sept. 7, 1929, Art. III, p. 473; EL SALVADOR, Const., Art. 42, p. 516; SWEDEN, Law No. 130, Secs. 2, 9, pp. 546, 548; SWITZERLAND, Fed. Decree, June 25, 1903, Art. 6, p. 558; TRANSJORDAN, Nationality Law of June 1, 1928, Sec. 16, *loc. cit.*, p. 38; TURKEY, Law of May 28, 1928, Arts. 4, 8, pp. 570, 572; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 31, p. 395.

<sup>43</sup> GREAT BRITAIN AND NORTHERN IRELAND, Nationality Act, *id.*, Sec. 1 (1), p. 62; AUSTRALIA, Nationality Act, 1920-1925, Sec. 22, p. 96; CANADA, Naturalization Act of 1914, Sec. 3 (5), Sec. 17, pp. 76, 82; NEWFOUNDLAND, Consolidated Stats., Sec. 14, British Nationality Act, 1929, Sec. 1 (2), pp. 140, 144; NEW ZEALAND, British Nationality Act, 1928, Secs. 1, 15, pp. 112, 114; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Secs. 1, 16, Act. No. 40, Sec. 5, pp. 116, 123, 129; CUBA, Const., Art. 4, *Gaceta Oficial*, *id.*, p. 4; GUATEMALA, Law of Feb. 21, 1894, Art. 6, pp. 321-322; HONDURAS, Law No. 31, Art. 1 (2), p. 334; MEXICO, Law of Nationality, Jan. 20, 1934, Art. 53, transitory provisions, Art. 2, *loc. cit.*

<sup>44</sup> See note 5.

<sup>45</sup> "That all children born outside the limits of the United States who are citizens thereof in accordance with the provision of section nineteen hundred and ninety three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority." 34 Stat. 1228.

In general, however, the Department of State does not extend protection to such children in cases arising from the obligations to which they may be subjected by the laws of the country whose nationality they own under the rule of *jus sanguinis*, during such time as they may be permanently residing in that country. They may, of course, revive their right to protection by returning to the United States at any time for permanent residence.

It is undoubtedly desirable that some method for the termination of such dual nationality acquired at birth be more generally incorporated in the laws of the various states which at present include no rules on this important subject.

## II. Loss of Nationality

### ACQUIRED BY NATURALIZATION

*By the Person Naturalized.* The question of extending protection to naturalized citizens who have returned to reside in the country of origin has always been one of the most difficult problems of nationality with which the United States has had to deal. In view of the very apparent desirability of placing limitations upon, if not removing entirely, the right of a naturalized citizen to continue to enjoy the rights and privileges of his adopted nationality when he returns to reside in his country of origin, it is quite surprising to find that only a small number of states have any legislative provisions on the subject. Although this situation is probably due to the fact that a comparatively small number of persons would be affected by it in most countries, still there can be little doubt that occasions for friction must continue to arise wherever this status of virtual, or actual, dual nationality is allowed to continue.

The laws of only four countries (Costa Rica, Cuba, Nicaragua, and El Salvador) provide for the outright loss of nationality as a result of residence in the country of origin for a stated period of years, two to five, subject to the proviso in Cuba and El Salvador that nationality is not affected if such a person is employed in official business of his government; in Costa Rica this proviso; with the additional one that the rule does not apply if residence is with permission of his government; and in Nicaragua the latter proviso only.<sup>46</sup> Under the law of Liberia two years residence in the country of origin or five years in any other foreign state raises a presumption of expatriation, which may be overcome by presentation of satisfactory evidence to a diplomatic or consular officer.<sup>47</sup> Naturalized citizens of Great Britain and Northern Ireland, Australia, Canada, British India, New Zealand, and Newfoundland,<sup>48</sup> lose their citizenship by seven years residence outside of

<sup>46</sup> COSTA RICA, Law of May 13, 1889, Art. 11, p. 188; CUBA, Const., Art. 5 (4), *Gaceta Oficial*, *id.*, p. 3; NICARAGUA, Law of Oct. 3, 1894, Art. 31, p. 452; EL SALVADOR, Law of April 3, 1900, Art. 10, p. 520.

<sup>47</sup> LIBERIA, Law of Feb. 8, 1922, Sec. 73, p. 414.

<sup>48</sup> GREAT BRITAIN AND NORTHERN IRELAND, Nationality Act., *id.*, Sec. 7 (2), (d), p. 65; AUSTRALIA, Nationality Act, 1920-1925, Sec. 12 (2) (d), p. 92; CANADA, Naturalization

His Majesty's Dominions other than as a representative of a British subject, firm or company, or of an institution established in His Majesty's Dominions, or in the service of the crown, unless they maintain substantial connections with His Majesty's Dominions. Greek law provides that "Greek subjects of foreign birth who leave Greece without intent to return lose their Greek nationality."<sup>49</sup>

The problem presented by the return of naturalized citizens to the country of origin to reside, or of their going abroad to reside indefinitely in some other country, was not dealt with by statutory enactment in the United States until 1907. Section 2 of the Act of March 2, 1907, provided that any naturalized citizen who resided abroad in his country of origin for two years, and in any other country for five years, should be presumed to have ceased to be an American citizen, provided that such presumption might be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under rules and regulations prescribed by the Department of State.<sup>50</sup> As construed by the Attorney-General and the Federal courts, such residence abroad does not result in actual loss of citizenship, but merely in the loss of right to diplomatic protection, the effect of the presumption being wiped out at any time by returning to the United States for permanent residence.<sup>51</sup> This law has been a prolific source of problems for the Department of State in determining the right of naturalized citizens to diplomatic protection, because of the fact that so many of these citizens return to the country of origin to reside.

*Cancellation of Naturalization.* Cancellation of naturalization, with consequent loss of nationality, would appear to be the natural penalty for fraud in connection with naturalization, yet we find that the laws of only twenty-two countries provide such penalty upon proof of fraud.<sup>52</sup> Some of the

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Act of 1914, Sec. 7 (2) (d), p. 79; BRITISH INDIA, Indian Naturalization Act, 1926, Sec. 8 (2) (d) p. 134; NEW ZEALAND, British Nationality Act, 1928, First Schedule, Sec. 7 (2) (d), p. 109; NEWFOUNDLAND, British Nationality Act, Art. IV, p. 145.

<sup>49</sup> GREECE, Law of Sept. 13, 1926, confirmed by the Decree of Aug. 12, 1927, Art. 4, p. 319.

<sup>50</sup> 34 Stat. 1228. Paragraph 2 of regulations issued by the Department of State on Jan. 6, 1934, entitled "Presumption of Expatriation Arising against Americans Residing Abroad and Rules Prescribed by the Department of State whereunder the Presumption May Be Overcome," lists the evidence which must be presented to overcome this presumption.

<sup>51</sup> Opinion of Attorney-General Wickersham of Dec. 1, 1910 (28 Ops. Atty. Gen. 504); *Camarlo v. Tillinghast*, 29 F. (2d), 527.

<sup>52</sup> ARGENTINE REPUBLIC, Decree of Dec. 19, 1931, Art. 14, enclosure with Despatch No. 551, Dec. 25, 1931, from American Vice Consul, Buenos Aires, to Secretary of State; GREAT BRITAIN AND NORTHERN IRELAND, Nationality Act, *id.*, Sec. 7, p. 65; AUSTRALIA, Nationality Act, 1920-1925, Sec. 12, p. 94; CANADA, Naturalization Act of 1914, Sec. 9, p. 76; NEWFOUNDLAND, British Nationality Act, 1929, Sec. IV, p. 141; NEW ZEALAND, British Nationality Act, 1928, First Schedule, Sec. 7, p. 109; BRITISH INDIA, Indian Naturalization Act, 1926, Sec. 8, p. 134; PALESTINE, Order of July 24, 1925, as amended by Order of Sept. 15, 1931, Sec. 10 (1), (2), enclosure with Despatch No. 343, Oct. 2, 1931, from

others, as for example, the law of Liberia, provide criminal punishment instead of the rather heavy penalty of loss of nationality.<sup>53</sup> The law of the United States provides for judicial proceedings for the cancellation of citizenship upon presentation of evidence that naturalization was secured illegally or through fraud, and it provides that return to the country of origin within five years after the issuance of the certificate of citizenship shall constitute *prima facie* evidence of fraud in the securing of such certificate.<sup>54</sup>

The laws of the following states provide for the cancellation of naturalization for acts of disloyalty, chiefly in time of war, or for failure to fulfill military obligations: Argentine Republic, Brazil, Great Britain and Northern Ireland, Australia, British India, Canada, Newfoundland, New Zealand, Union of South Africa, France, Persia, Rumania.<sup>55</sup> It is somewhat surprising to find that loss of nationality acquired by naturalization results under the laws of thirteen states from acts or crimes indicating bad character, such as "acts rendering the holder unworthy of citizenship (Chile), an extraditable crime (Colombia), a crime carrying a penalty of not less than two years in jail (Egypt).<sup>56</sup> The law of Germany, adopted July 14, 1933, is

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American Vice Consul, Jerusalem, to Secretary of State; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Sec. 7, p. 119; CHILE, Decree Law No. 747, Art. 8, p. 172; COLOMBIA, Law of Feb. 2, 1931, Arts. 1, 3, 6, enclosure with Despatch No. 2320G, Mar. 9, 1931, from American Minister to Colombia to Secretary of State; COSTA RICA, Law of May 13, 1889, Art. 9, p. 187; Decree of Feb. 18, 1931, Art. 8, *La Gaceta*, *Diario Oficial*, No. 42, Feb. 21, 1931; ECUADOR, Law of Oct. 13, 1921, as amended Sept. 17, 1925, Art. 67, p. 223; EGYPT, Decree Law No. 19, Art. 10, p. 227; HONDURAS, Law No. 31, Art. 15, p. 335; LATVIA, Law of June 2, 1927, Supp., Feb. 5, 1930, Art. VIII, enclosure with Despatch No. 7729, May 19, 1931, from American Minister at Riga, to Secretary of State; LIBERIA, Law of Jan. 6, 1908, Sec. 2, p. 411; MEXICO, Law of Nationality, Jan. 20, 1934, Art. 47, *loc. cit.*; POLAND, Order of June 7, 1920, Art. 18, p. 486; EL SALVADOR, Law of April 3, 1900, Art. 14, p. 520; SWITZERLAND, Fed. Decree of June 25, 1903, Sec. 1, p. 557; URUGUAY, Law of Feb. 1, 1928, Arts. 25, 26, pp. 633, 634.

<sup>53</sup> Law of Jan. 6, 1908, Sec. 7, p. 412.

<sup>54</sup> Law of June 29, 1906, Sec. 15, pp. 533-534; 34 Stat. 596.

<sup>55</sup> ARGENTINE REPUBLIC, Decree of Dec. 19, 1931, Art. 8, *loc. cit.*, Law No. 8129, July 4, 1911, Art. 16, enclosure with Despatch No. 1454, Dec. 16, 1931, from American Chargé d'Affaires ad interim at Buenos Aires to Secretary of State; BRAZIL, Const., Art. 107 (c), Hambloch, *op. cit.*, p. 44; GREAT BRITAIN AND NORTHERN IRELAND, Nationality Act, *id.*, Sec. 7 (2), p. 65; AUSTRALIA, Nationality Act, 1920-1925, Sec. 12 (2), p. 92; BRITISH INDIA, Indian Naturalization Act, 1926, Sec. 8 (2), p. 133; CANADA, Naturalization Act, 1914, Sec. 9 (2), p. 78; NEWFOUNDLAND, British Nationality Act, Art. 4, p. 145; NEW ZEALAND, British Nationality Act, 1928, First Schedule, Sec. 7 (2), p. 109; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Sec. 7 (1), p. 119; FRANCE, Law of Aug. 10, 1927, Arts. IX (5), X (1), p. 248; PERSIA, Law of Sept. 7, 1929, Art. VI, p. 474; RUMANIA, Law of Feb. 23, 1924, Art. 41, p. 506.

<sup>56</sup> CHILE, Decree Law No. 747, of Dec. 15, 1925, Art. 8, p. 172; COLOMBIA, Law of Feb. 2, 1931, Art. 1 (c), *loc. cit.*; COSTA RICA, Decree of Feb. 18, 1931, Art. 8, *La Gaceta*, *id.*; EGYPT, Decree Law No. 19, Art. 10, p. 227; GERMANY, Law Concerning the Revocation of Naturalization and the Cancellation of German Citizenship, July 14, 1933, *Reichsgesetzblatt*, No. 81, July 15, 1933, Pt. I; Decree for execution of law of July 14, 1933, *Reichsgesetzblatt*, No. 87, July 28, 1933, Pt. I; for GREAT BRITAIN AND NORTHERN IRELAND, AUSTRALIA, BRITISH

especially noteworthy in this connection. It provides that any naturalization which took place between November 9, 1918, and January 30, 1933, may be cancelled if it is not regarded as desirable.<sup>57</sup> A decree of July 26, 1933, lists as tests of desirability, national principles, racial, political, and cultural viewpoints, and provides that they are especially applicable to Eastern Jews, unless they fought at the front in the war, or have rendered special service to German interests.<sup>58</sup> This decree adds as another group who may not be regarded as desirable, those who have been guilty of severe offenses or of a crime, or who have acted in any other way prejudicial to the welfare of the State and people.

*By minor children of person naturalized.* The chief fact worthy of mention in connection with the question of the loss of nationality by children acquiring nationality by the naturalization of the parents, is the small number of states that allow the child in such a case any choice with respect to his nationality, either at the time of the parent's naturalization or at the time he reaches his majority.<sup>59</sup> Minor children, who, under the laws of the following states acquire automatically the new nationality of the parents upon the naturalization of the latter, may renounce such nationality upon attaining their majority: Albania, British India, Ecuador, Greece, Netherlands, Persia, Rumania, Siam.<sup>60</sup> In the following members of the British Empire, if minor children have been included in the naturalization of the parents by the naturalizing authority, in the exercise of his discretion, they may renounce their nationality within one year after attaining majority: Great Britain and Northern Ireland, Australia, Canada, Newfoundland, New Zealand, Union of South Africa.<sup>61</sup> A few states provide that minor children acquire the new nationality of the parent unless they decline it within a fixed period (usually six months or a year) after attaining majority.<sup>62</sup> The laws

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INDIA, CANADA, NEWFOUNDLAND, NEW ZEALAND, UNION OF SOUTH AFRICA, and PERSIA see preceding note.

<sup>57</sup> See preceding note.

<sup>58</sup> See note 56.

<sup>59</sup> The laws of a large majority of states provide that minor children acquire nationality upon naturalization of the parents. See this JOURNAL, Vol. 23, Spl. Supp. (April, 1929), pp. 95-98.

<sup>60</sup> ALBANIA, Civil Code, Art. 17, p. 7; BRITISH INDIA, Indian Naturalization Act, 1926, Sec. 10, p. 135; ECUADOR, Const., Sec. 2, Art. 9, p. 222; Law of Oct. 18, 1921, Art. 71, p. 224; GREECE, Law No. 391, Art. 17 (1), p. 316; NETHERLANDS, Law of Dec. 12, 1892, Art. 6, p. 442; PERSIA, Law of Sept. 7, 1929, Art. IX, p. 474; RUMANIA, Law of Feb. 23, 1924, Art. 35, p. 501; SIAM, Naturalization Law, May 18, 1911, Sec. 13, p. 523.

<sup>61</sup> GREAT BRITAIN and NORTHERN IRELAND, Nationality Act, *id.*, Art. 5 (1), p. 64; AUSTRALIA, Nationality Act, 1920-1925, Sec. 10 (1), p. 90; CANADA, Naturalization Act, 1914, Sec. 7 (1), p. 78; NEWFOUNDLAND, Consolidated Stats., *id.*, Sec. 5 (1) p. 139; NEW ZEALAND, British Nationality Act, 1928, First Schedule, Pt. II, Sec. 5 (1), p. 109; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Sec. 5 (1), p. 117.

<sup>62</sup> BULGARIA, Law of Dec. 31, 1903, Arts. 11, 18, pp. 162, 166; SYRIA, Order No. 16/S, Art. 4, p. 301; GREATER LEBANON, Order No. 15/S, Art. 4, p. 298; MONACO, Civil Code, Arts. 10, 18, pp. 437, 438; VENEZUELA, Law of July 13, 1928, Art. 4 (1), p. 642.

of the member states of the British Empire provide that in case of cancellation of the certificate of naturalization of the parent, the Secretary of State may direct that the minor children shall also cease to be British subjects.<sup>53</sup>

The law of the United States contains no provision granting the minor child of a naturalized citizen, acquiring citizenship upon the naturalization of the parent, a right to elect to retain his former nationality on attaining majority. Under Section 2 of the Act of May 24, 1934, amending Section 5 of the Act of March 2, 1907, the minor child of an alien becomes a citizen upon the naturalization or resumption of American citizenship by the father or the mother, such citizenship not to begin until five years after the child begins to reside permanently in the United States.<sup>54</sup>

#### BY MARRIED WOMEN

*Upon termination of the marital status.* It is noteworthy that such a small number of countries provide a method by which the woman who acquired nationality through marriage may terminate that nationality upon termination of the marital status and reacquire her original nationality, eleven providing that this may be accomplished by a declaration,<sup>55</sup> and four that where continuing or taking up residence in the country of origin results in resumption of the original nationality, nationality is thereby lost.<sup>56</sup> Of course, in a number of other states termination of the nationality of the husband's state may be achieved by naturalization in the country of origin.<sup>57</sup>

In a number of states the law carries a specific provision that nationality of the wife is not affected by dissolution of the marriage.<sup>58</sup> In Yugoslavia

<sup>53</sup> GREAT BRITAIN, Nationality Act, *id.*, Sec. 7 (a), p. 86; AUSTRALIA, Nationality Act, 1920-1925, Sec. 13, p. 90; CANADA, Naturalization Act, 1914, Sec. 10, p. 80; BRITISH INDIA, Indian Naturalization Act, 1926, Sec. 9, p. 135; NEWFOUNDLAND, Brit. Nationality Act, 1929, Sec. IV (6), p. 148; NEW ZEALAND, British Nationality Act, 1928, First Schedule, Sec. 7 (a), p. 109; PALESTINE, Order of July 14, 1925, Sec. 11, p. 154; UNION OF SOUTH AFRICA, Brit. Nationality Act, *id.*, Sec. 8, p. 121.

<sup>54</sup> 48 Stat. 797. With respect to the acquisition of citizenship by minor children upon naturalization of the parent, see also Sec. 2172 of the Revised Statutes (1878), which is still in force, though amended in part by Sec. 2 of the Act of May 24, 1934.

<sup>55</sup> AFGHANISTAN, Code, Sec. 89, p. 3; BELGIUM, Law of Oct. 15, 1932, Art. 1, *Moniteur Belge*, *id.*, p. 6784; BULGARIA, Law of Dec. 31, 1903, Art. 15, p. 165; ECUADOR, Const., Art. 9 (4), p. 222; IRAQ, Law of Oct. 9, 1924, Art. 17, p. 350; LIBERIA, Law of Feb. 8, 1922, Sec. 70, p. 414; NETHERLANDS, Law of Dec. 12, 1892, Art. 9, p. 444; PERSIA, Law of Sept. 7, 1929, Art. XI, p. 475; RUMANIA, Law of Feb. 23, 1924, Art. 40, p. 502; TRANSJORDAN, Nationality Law, June 1, 1928, Sec. 10 (a), *loc. cit.*, p. 37; TURKEY, Law of May 28, 1928, Art. 13, p. 571.

<sup>56</sup> ALBANIA, Civil Code, Art. 14, p. 6; EGYPT, Decree Law No. 19, Art. 14, p. 223; ITALY, Law of June 13, 1912, Art. 10, p. 364; JAPAN, Law No. 66, Art. 19, p. 384.

<sup>57</sup> See note 99.

<sup>58</sup> GREAT BRITAIN, Nationality Act, *id.*, Sec. 11, p. 88; AUSTRALIA, Nationality Act, 1920-1925, Sec. 19, p. 95; CANADA, Naturalization Act, 1914, Sec. 14, p. 82; NEWFOUNDLAND, Consolidated Stats., Sec. 11, p. 140; NEW ZEALAND, British Nationality Act, 1928, Sec. 11, p. 113; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Sec. 13, p. 122;

a woman who acquires nationality by marriage loses it unconditionally upon annulment of the marriage by court decision,<sup>69</sup> and in Venezuela such a woman loses nationality upon termination of the marriage, unless she manifests a desire within one year to retain Venezuelan nationality.<sup>70</sup>

Under the law of the United States up to the enactment of the Cable Act in 1922, any foreign woman acquiring American citizenship by marriage to an American retained such citizenship upon termination of the marital status if she continued to reside in this country, unless she formally renounced it, and if residing abroad she might retain her citizenship by registering as such before an American consul within one year after termination of the marital relation.<sup>71</sup> Under the Cable Act as at present in force, an alien woman does not become a citizen by reason of marriage to an American citizen, but if she takes advantage of the short procedure of naturalization provided in that Act, she loses the citizenship thus acquired only by taking a step which would result in expatriation for any citizen under the law.<sup>72</sup>

*Upon marriage to an alien.* In view of the increasing trend toward equality for women in questions of nationality, it is important to observe that the laws of only fourteen states provide for the unconditional loss of nationality by marriage to an alien.<sup>73</sup> Of these only six have a very numerous population: Czechoslovak Republic, Germany, Hungary, Netherlands, Spain, and Switzerland. Thus while the hardships ensuing from a condition of statelessness may still arise in a considerable number of cases, the extent of such a status to be anticipated from the increasing number of states the laws of which provide that marriage to a national does not of itself confer his nationality upon the wife, is not as widespread as might be supposed. The population of the countries following this rule is approximately 200,000, or about 11 $\frac{1}{4}$ % of the total population of the countries embraced in this study, while their foreign trade constitutes approximately 19 $\frac{1}{2}$ % of the total.

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PALESTINE, Order of July 24, 1925, Sec. 13, p. 154; COSTA RICA, Law of May 13, 1889, Art. 3 (3), p. 186; HUNGARY, Law of Dec. 20, 1879, Art. 35, p. 341; LITHUANIA, Prov. Law, Art. 1 (e), p. 417; MEXICO, Law of Nationality, Art. 2 (II), *loc. cit.*; PERU, Civil Code of 1852, Art. 41, p. 478.

<sup>69</sup> Law of Nationality, Sept. 21, 1928, Art. 44, p. 398.      <sup>70</sup> Const., Art. 29 (4), p. 640.

<sup>71</sup> Law of March 2, 1907, Sec. 4, p. 601; 34 Stat. 1228.

<sup>72</sup> Law of Sept. 22, 1922, as amended by laws of July 3, 1930, March 3, 1931, and May 24, 1934, Sec. 2, 42 Stat. 1021, 46 Stat. 849, 46 Stat. 1511, 48 Stat. 797.

<sup>73</sup> BOLIVIA, Civil Code of 1830, Art. 11, p. 46; CZECHOSLOVAK REPUBLIC, Const. Law No. 236, Sec. 16, p. 204; GERMANY, Law of Nationality, July 22, 1913, Sec. 17 (6), p. 368; HAITI, Law of Aug. 22, 1907, Art. 9, p. 328; HUNGARY, Law of Dec. 20, 1879, Art. 34, p. 341; IRAQ, Law of Oct. 29, 1924, Art. 17, p. 351; LIBERIA, Law of Feb. 8, 1922, Sec. 71, p. 414; LIECHTENSTEIN, Law of May 14, 1864, Art. II (12), *loc. cit.*; LUXEMBURG, Civil Code of 1807, Art. 19, p. 420; NETHERLANDS, Law of Dec. 12, 1892, Art. 7 (2), p. 444; NETHERLAND COLONIES, Law of Feb. 10, 1910, Art. 2 (2), p. 447; SPAIN, Royal Decree of Nov. 17, 1852, Art. 1 (5), p. 530; Civil Law of 1889, Art. 22, p. 538; SWITZERLAND, Civil Code, Art. 161 (1), p. 560; TRANSJORDAN, Nationality Law, June 1, 1928, Sec. 10, *loc. cit.*, p. 37.

The conditional rule under which the woman loses her nationality only in case she acquires the nationality of her husband is the more general one obtaining in thirty-four countries.<sup>74</sup> In six of these, Albania, Belgium, Australia, Estonia, Yugoslavia, and Peru, she may by declaration retain her original nationality. Under the laws of Ecuador and Sweden she must in addition leave the territory of the state. Women nationals of Albania, Belgium, Australia, Peru, Estonia, Rumania and Yugoslavia,<sup>75</sup> may, upon marrying an alien whose nationality they acquire by the marriage, retain their nationality by making an official declaration of desire to do so. The countries in this group make up just over 15% of the total population of the countries studied, and have about 34½% of the total trade.

Marriage to an alien does not affect the nationality of a woman according to the laws of Argentine Republic, Cuba, Mexico, Russia, Turkey, and Uruguay.<sup>76</sup> The United States now belongs to this group, the marriage of a woman citizen to an alien not affecting her citizenship unless she makes a formal renunciation of it before a court having jurisdiction over naturalization of aliens.<sup>77</sup> Although there are only seven countries in this group, they

<sup>74</sup> ALBANIA, Civil Code, Art. 15, p. 6; AUSTRIA, Fed. Law No. 285, Sec. 9 (1), p. 19; BELGIUM, Law of Dec. 17, 1932, Art. 18 (2), *Moniteur Belge*, *id.*, p. 6790; GREAT BRITAIN, Nationality Act, *id.*, Sec. 10, p. 68; CANADA, Naturalization Act of 1914, as amended by act of Aug. 3, 1931, Sec. 13 (2), Stats. of Canada, 21-22 Geo. V, Ch. 39, p. 193; NEWFOUNDLAND, Consolidated Stats., Sec. 10, p. 140; NEW ZEALAND, British Nationality Act, Second Schedule, Section 10, p. 113; PALESTINE, Order of July 24, 1925, as amended by Order of Sept. 15, 1931, Sec. 12 (1), *loc. cit.*; UNION OF SOUTH AFRICA, Act No. 40, Sec. 2, p. 128; BULGARIA, Law of Dec. 31, 1903, Art. 16, p. 165; COSTA RICA, Law of May 13, 1889, Art. 4 (5), p. 186; DANZIG, Law of May 30, 1922, Sec. 14, p. 211; DOMINICAN REPUBLIC, Const., Art. 8, p. 218; ECUADOR, Law of Oct. 13, 1921, Arts. 73, 74, p. 224; EGYPT, Decree Law No. 19, Art. 14, p. 228; ETHIOPIA, Law of July 22, 1930, Sec. 4, *loc. cit.*; GREATER LEBANON, Order No. 15/S, Art. 6, p. 299; SYRIA, Order No. 16/S, Art. 6, p. 302; GREECE, Law No. 391, Art. 26, p. 318; ITALY, Law of June 12, 1913, Art. 10, p. 335; JAPAN, Law No. 66, Art. 18, p. 384; LATVIA, Law of June 2, 1927, Art. VII, p. 409; MONACO, Civil Code, Art. 19, p. 438; NICARAGUA, Const., Art. 10 (2), p. 449; PORTUGAL, Civil Code of 1867, Art. 22 (4), p. 492; EL SALVADOR, Law of April 3, 1900, Art. 2, p. 518; SIAM, Nationality Law, April 10, 1913, Sec. 4, p. 524; SWEDEN, Law No. 130, Art. 8, p. 548; VENEZUELA, Civil Code, Art. XXII, p. 641.

<sup>75</sup> ALBANIA, Civil Code, Art. 5, p. 6; BELGIUM, Law of Dec. 17, 1932, Art. 18 (2), *Moniteur Belge*, *id.*, p. 6790; AUSTRALIA, Nationality Act, 1920-1925, Sec. 18, p. 95; ESTONIA, Law No. 87, Sec. 19, p. 234; PERU, Const., Art. 6, *Const. Politicc*, *id.*; RUMANIA, Law of Feb. 23, 1924, Art. 38, p. 502; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 29, p. 395.

<sup>76</sup> ARGENTINE REPUBLIC, Decree of Oct. 8, 1920, p. 12; CUBA, Law of July 1, 1929, Art. I, p. 199; MEXICO, Law of Nationality, Jan. 20, 1934, Art. 4, *loc. cit.*; RUSSIA, Regulation, April 22, 1931, Sec. 8, *loc. cit.*; TURKEY, Law of May 28, 1928, Art. 13, p. 571; URUGUAY, Decree of Jan. 21, 1921, p. 628.

<sup>77</sup> Law of Sept. 22, 1922, Sec. 3 (a), p. 608. The renunciation provision of this section has been amended by implication by Sec. 3 of the Law of May 24, 1934, which reads as follows: "A citizen of the United States may upon marriage to a foreigner make a formal renunciation of his or her United States citizenship before a court having jurisdiction over naturalization of aliens, but no citizen may make such renunciation in time of war, and if war should be declared within one year after such renunciation then such renunciation shall be void." 48 Stat. 797.

have almost 20% of the total population of all the countries included, and 20% of the foreign trade. This is due to the inclusion in the group of Russia and the United States.

*Upon acquisition of foreign nationality or loss of nationality by husband.* The small number of countries providing for the unconditional loss of nationality by the wife upon the acquisition of a new nationality by her husband or upon his loss of nationality is even more striking than in the case of loss of nationality by a woman upon marriage to an alien. Only three countries, Cuba, Latvia, and the Netherlands, provide for such unconditional loss upon the acquisition of a foreign nationality by the husband.<sup>78</sup> Two countries, Austria and Germany, provide for the unconditional loss of nationality by the wife upon loss of nationality by the husband,<sup>79</sup> and the wife of a Hungarian national loses her nationality if she follows her husband abroad or is residing with him at the time of his loss of nationality.<sup>80</sup> The Polish law provides that the wife shall lose her nationality upon loss by the husband unless the Minister of the Interior rules otherwise.<sup>81</sup>

It should be noted that a majority of the countries in this group, twenty-three to be exact, have laws providing either that the wife's nationality is not affected by the husband's loss of nationality,<sup>82</sup> or that she loses her nationality only in case she acquires a new nationality with her husband,<sup>83</sup> or that the loss of her nationality is conditional upon her consent to the change of her nationality,<sup>84</sup> or that she failed to elect, under the form prescribed by the law, to retain her original nationality.<sup>85</sup> Although the Act of September

<sup>78</sup> CUBA, Civil Code of 1888-1889, Art. 25, p. 194; LATVIA, Law of Nationality, June 2, 1927, Art. 7, p. 409; NETHERLANDS, Law of Dec. 12, 1892, Art. 5, p. 442.

<sup>79</sup> AUSTRIA, Fed. Law No. 285, Secs. 9 (2), 10 (2), p. 19; GERMANY, Law of Nationality, July 22, 1913, Sec. 29, p. 311.

<sup>80</sup> HUNGARY, Law of Dec. 20, 1879, Arts. 26, 32, pp. 340, 341.

<sup>81</sup> Law of Jan. 20, 1920, Art. 13, p. 481.

<sup>82</sup> GREECE, Law No. 391, Art. 24, p. 317; MEXICO, Law of Nationality, Jan. 20, 1934, Art. 44, *loc. cit.*; PERSIA, Law of Sept. 7, 1923, Art. XIII, p. 475 (unless decision of Council of Ministers includes her).

<sup>83</sup> ALBANIA, Civil Code, Art. 16, p. 7; COSTA RICA, Law of May 13, 1889, Art. 6, p. 187; HAITI, Law of Aug. 22, 1907, Art. 15, p. 325; ITALY, Law of June 12, 1913, Art. 11, p. 365; JAPAN, Law No. 66, Art. 21, p. 384; EL SALVADOR, Law of April 3, 1900, Art. 2, p. 518; SIAM, Nationality Law, April 10, 1913, Sec. 10, p. 524; SWITZERLAND, Fed. Decree, June 25, 1903, Art. 9, p. 558; Civil Code, Dec. 10, 1907, Art. 161 (1), p. 560; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 37, p. 397.

<sup>84</sup> BULGARIA, Law of Dec. 31, 1903, Art. 22, p. 166 (not affected by husband's acquisition of new nationality); DANZIG, Law of May 31, 1922, Secs. 16, 17, 19, p. 211; ESTONIA, Law No. 87, Sec. 22, p. 235; PORTUGAL, Civil Code of 1867, Art. 22, p. 491; NICARAGUA, Law of Oct. 3, 1894, Art. 2, p. 452 (changes nationality only if she lives in husband's new country).

<sup>85</sup> BELGIUM, Law of Dec. 17, 1932, Art. 18 (3); Law of May 15, 1922, Art. 18 (3) as amended by Law of Aug. 4, 1926, Art. 17, and Law of Oct. 15, 1932, Art. 9, *Moniteur Belge*, *id.*, p. 3790; GREAT BRITAIN AND NORTHERN IRELAND, Nationality Act, *id.*, as amended by Act of Nov. 17, 1933, Sec. 10 (3), enclosure with despatch No. 308, Nov. 11, 1933, from American Ambassador, London, to Secretary of State; AUSTRALIA, Nationality Act, 1920-

22, 1922, does not in terms cover the question of the effect upon a woman citizen of the United States of the loss of nationality by her husband or his acquisition of a new nationality, by giving women an equal and independent status of nationality it provides by implication that a change of nationality by the husband has no effect upon the nationality of the wife.<sup>86</sup> This is the rule at present followed with respect to such cases. Prior to the passage of the Cable Act, the word "marries" appearing in Section 3 of the Act of March 2, 1907,<sup>87</sup> was construed to mean "marries or is married to," and consequently it was held that the words "shall take the nationality of her husband" meant that the wife should lose her American citizenship upon her husband's loss of such citizenship.

Under the laws of seven member states of the British Empire, the Secretary of State may in his discretion, upon cancellation of the husband's naturalization, direct that the wife also cease to be a British subject.<sup>88</sup> Otherwise her nationality remains unaffected, subject to her right to make a declaration of alienage within six months. Denmark, Iceland, Norway, and Sweden have the rather unusual provision that the wife of a Danish national follows his status when he loses his nationality at his twenty-second year by reason of his birth abroad and never having been domiciled in the country.<sup>89</sup>

#### BY MINOR CHILDREN

*Upon acquisition of foreign nationality or the loss of nationality by the parent or parents.* In view of the fact that minor children as a rule change their homes and their actual allegiance with their parents, it is perhaps cause for some surprise that the laws of only eight countries provide for the unconditional loss of nationality by the children upon the acquisition of a foreign nationality or the loss of nationality by the parents.<sup>90</sup> It should be

1925, Sec. 18, p. 95; CANADA, Naturalization Act of 1914, as amended by Act of Aug. 3, 1931, Sec. 13 (4), Stats. Canada, 21-22 Geo. V, Ch. 39, p. 193; NEWFOUNDLAND, Consolidated Statutes, Sec. 10, p. 140; PALESTINE, Order of July 24, 1925, Sec. 12, p. 155; EGYPT, Decree Law No. 19, Art. 15, p. 228.

<sup>86</sup> See especially Sec. 3 (a) of the Act as amended by the Act of March 3, 1931, 46 Stat. 1511.

<sup>87</sup> "Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband." 34 Stat. 1228.

<sup>88</sup> GREAT BRITAIN AND NORTHERN IRELAND, Nationality Act, *id.*, Sec. 7a, p. 66; AUSTRALIA, Nationality Act, 1920-1925, Sec. 13, p. 94; NEWFOUNDLAND, British Nationality Act, 1929, Sec. IV (6), p. 146; NEW ZEALAND, British Nationality Act, 1928, First Schedule, Section 7a, p. 110; PALESTINE, Order of July 24, 1925, Sec. 11, *loc. cit.*; CANADA, Naturalization Act of 1914, Sec. 10, p. 80; BRITISH INDIA, Indian Naturalization Act, 1926, Secs. 9, 10, p. 135; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Sec. 8, p. 121.

<sup>89</sup> DENMARK, Law of April 18, 1925, Art. VI, p. 215; ICELAND, Law of June 15, 1926, Art. 6, p. 346; NORWAY, Law of Oct. 3, 1924, Sec. 9, p. 455; SWEDEN, Law No. 130, Art. 9, p. 548.

<sup>90</sup> ARGENTINE REPUBLIC, Law No. 346, Art. 4, p. 11; CUBA, Civil Code, Art. 18, p. 193; GERMANY, Law of Nationality, July 22, 1913, Sec. 29, p. 311; IRAQ, Law of Oct. 9, 1924,

observed, however, that such an unconditional rule is not, in general, desirable because of the status of statelessness which may thereby result from the fact that not all states accept such children as nationals upon naturalization of the parents. The more equitable rule, therefore, is that obtaining in eighteen states according to which minor children lose their nationality upon the acquisition of a foreign nationality by the parent, or parents, when the new nationality is acquired also by such children, or provided that the children live or take up a residence in the new country.<sup>91</sup>

The Department of State has long adhered to this rule, holding that the minor children of American citizens acquiring a new nationality by naturalization in a foreign country lose their American nationality, provided they remove to the new country of the parents and acquire the nationality of the parents under the law of the new country. There is no specific statutory provision for such cases, although, as pointed out above, the law has long provided that the minor children of aliens naturalized in the United States acquire the nationality of the parents if they take up a permanent residence in the United States during minority the original law on this point having been enacted in 1802.<sup>92</sup>

In the case of the six member states of the British Empire included in this group, and of Palestine and Egypt, such loss is subject to the right of the child to make a declaration of his desire to regain his citizenship of origin within one year after attaining majority. It may be observed that three additional countries, Afghanistan, Estonia, and Portugal, permit the minor children to follow the nationality of the father, provided either the children, or the mother acting in their behalf, accept the new nationality.<sup>93</sup>

Austria has the interesting rule that the minor child loses his citizenship in case of loss of nationality by the father only in case he does not have citizen-

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Art. 18, p. 357; LIECHTENSTEIN, Law of May 14, 1864, Art. II, Par. 11, *loc. cit.*; NETHERLANDS, Law of Dec. 12, 1892, Art. 10, p. 444; SPAIN, Civil Laws of 1889, Art. 18, p. 537; TRANSJORDAN, Nationality Law, June 1, 1928, Sec. 12, *loc. cit.*, p. 37.

<sup>91</sup> ALBANIA, Civil Code, Art. 17, p. 7; AUSTRIA, Fed. Law No. 285, Sec. 10 (2), p. 29; BELGIUM, Law of Dec. 17, 1932, Art. 18 (4), *Moniteur Belge*, *id.*, p. 6789; GREAT BRITAIN, Nationality Act, *id.*, Sec. 12, p. 68; AUSTRALIA, Nationality Act, 1920-1925, Sec. 20, p. 95; CANADA, Naturalization Act of 1914, Sec. 15, p. 82; NEWFOUNDLAND, Consolidated Stats., Sec. 12, p. 140; NEW ZEALAND, British Nationality Act, 1928, Second Schedule, Sec. 12, (1), p. 113; PALESTINE, Order of July 24, 1925, Sec. 14, p. 155; UNION OF SOUTH AFRICA, Act No. 40, Sec. 4, p. 128; DANZIG, Law of May 30, 1922, Secs. 14, 17, p. 211; EGYPT, Decree Law No. 19, Art. 16, p. 228; ITALY, Law of June 12, 1913, Art. 12, p. 366; JAPAN, Law No. 66, Art. 21, p. 385; NICARAGUA, Law of Oct. 3, 1894, Art. 2, p. 452; EL SALVADOR, Law of April 3, 1900, Art. 2 (3), p. 518; SIAM, Nationality Law, April 10, 1913, Sec. 10, p. 524; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 37, p. 397.

<sup>92</sup> See note 64. Sec. 2172 of the Revised Statutes, 1878, mentioned in note 64, is a reenactment of the law of April 14, 1802, p. 573. For a recent Circuit Court of Appeals' decision upholding this view see *U. S. v. Reil*, 73 F. (2d) 153.

<sup>93</sup> AFGHANISTAN, Code, Sec. 92, p. 4; ESTONIA, Law No. 87, Sec. 22, p. 235; PORTUGAL, Civil Code of 1867, Art. 22, p. 421.

ship in his own right.<sup>94</sup> The four Scandinavian countries apply the same rule to children as that stated above with respect to the wife upon loss of nationality of her husband.<sup>95</sup> The Greek rule is also quite limited in scope, applying only to the children of Greek subjects of foreign birth who lose their nationality on leaving Greece without intent to return.<sup>96</sup> Attention is directed especially to the Russian law limiting the effect of the loss of nationality by the parents to children under fourteen years of age.<sup>97</sup> The age is perhaps low, but the rule would seem to represent a desirable innovation, as the present general rule placing the age at twenty-one takes insufficient account of the earlier development on the part of the child of the ability to exercise an intelligent independent choice of his own as to the matter of his nationality.

#### GENERAL PROVISIONS ON LOSS OF NATIONALITY

*By naturalization abroad.* Dual nationality arises in either of two ways—by the acquisition of the nationality of two countries at birth, one *jus soli* and one *jus sanguinis*, and by naturalization when the acquisition of a new nationality does not result in the loss of the old, including the acquisition of a new nationality by marriage. Controversies arising out of the latter situation have been numerous and important in the history of the United States, beginning with the birth of the country and continuing down to the present time. Consequently it is of considerable importance to note that so many countries, twenty-four, today specifically require the consent of the government before a national can acquire the nationality of another state (loss of his nationality of origin ensuing therefrom).<sup>98</sup> That this presents a problem of some moment for the United States may be seen from the fact that among this group are such states as Bulgaria, Finland, France, Greece, Hungary, Norway, Poland, Sweden, and Yugoslavia, all important contributors, both

<sup>94</sup> Fed. Law No. 285, Sec. 8 (1), (2), p. 19.

<sup>95</sup> See note 89.

<sup>96</sup> Law of Sept. 13, 1926, Art. 4, p. 319.

<sup>97</sup> Regulation, April 22, 1931, Secs. 9, 10, *loc. cit.*

<sup>98</sup> AFGHANISTAN, Code, Sec. 91, p. 3; ALBANIA, Civil Code, Article 11, p. 6; BELGIAN CONGO, Decree of June 21, 1904, p. 44; BULGARIA, Law of Dec. 31, 1903, Art. 17 (1), p. 166; CHINA, Rev. Law, Feb. 5, 1929, Art. 11, p. 178; DANZIG, Law of May 30, 1922, Secs. 16, 18, p. 211; ESTONIA, Law No. 87, Sec. 20, p. 234; EGYPT, Decree Law, No. 19, Art. 12, p. 228; FINLAND, Law of June 17, 1927, Secs. 1, 4, pp. 239, 240; FRANCE, Law of Aug. 10, 1927, Art. IX, p. 249; GREATER LEBANON, Order No. 15/S, Art. 8 (1), p. 299; SYRIA, Order No. 16/S, Art. 8 (1), p. 302; GREECE, Law No. 391, Art. 23 (a), p. 317; SAUDI ARABIA, Law of Sept. 24, 1926, Sec. 6, p. 330; HUNGARY, Law of Dec. 20, 1879, Arts. 20–22, 25, 28, 29, pp. 339–340; LYBIA, Law No. 1013, Art. 32, p. 379; LATVIA, Law of June 2, 1927, Art. IX, p. 409; LIECHTENSTEIN, Law of May 14, 1864, Art. II, pars. 8 (a), (b), (c), 13, *loc. cit.*; NORWAY, Law of Aug. 8, 1924, Secs. 8, 10, p. 455; PERSIA, Law of Sept. 7, 1929, Art. XIII, p. 475; POLAND, Law of Jan. 20, 1920, Art. XI (1), p. 481; SIAM, Naturalization Law 130, Sec. 15, p. 523; Nationality Law, April 10, 1913, Secs. 4, 5, 10, p. 524; SWEDEN, Law No. 130, Art. 8, p. 548; SWITZERLAND, Fed. Decree of June 25, 1903, Art. 7, p. 558; TURKEY, Law of May 28, 1928, Art. 7, p. 570; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Arts. 22–26, pp. 393–394.

past and present, to the flow of immigration into this country. However, it is encouraging to observe that a much larger number of states, forty-three, provide for the unconditional loss of nationality upon naturalization in another country.<sup>99</sup>

It is hardly necessary to recall that the United States has from the beginning of its history been an aggressive exponent of the right of unconditional expatriation.<sup>100</sup> Nevertheless, Congress did not until 1907 reduce to statutory form the rule which had been generally followed by the courts and by the administrative authorities, that loss of nationality resulted from naturalization in a foreign country.<sup>101</sup>

The facts with respect to the comparative trade and population of these two groups tell a striking and yet somewhat contradictory story. The twenty-four countries with the conditional rule of naturalization abroad have nearly 37% of the population of all the countries concerned, but only slightly more than 18% of the trade. On the other hand, the forty-three countries whose laws allow unconditional expatriation by naturalization in a foreign country have only 35% of the population, but their trade makes up over 72% of the total. This variation is due chiefly to the inclusion of China in the conditional group, and most of the countries of chief industrial importance in the unconditional group. It means apparently that the rule

<sup>99</sup> AUSTRIA, Fed. Law No. 285, Sec. 10 (1), p. 19; BELGIUM, Law of Dec. 17, 1932, Art. 18, *Moniteur Belge*, *id.*, p. 6789; BOLIVIA, Const., Art. 35 (1), p. 46; BRAZIL, Const., Art. 107 (a), Hambloch, *op. cit.*, p. 43; GREAT BRITAIN, Nationality Act, *id.*, Sec. 13, p. 68; AUSTRALIA, Nationality Act, 1920-1925, Sec. 21, p. 96; CANADA, Naturalization Act of 1914, Sec. 16, p. 82; NEWFOUNDLAND, Consolidated Stats., Sec. 13, p. 141; NEW ZEALAND, British Nationality Act, 1928, Second Schedule, Sec. 13, p. 114; PALESTINE, Order of July 24, 1925, Sec. 15, p. 156; UNION OF SOUTH AFRICA, British Nationality Act, *id.*, Sec. 15, p. 123; CHILE, Const., Art. 6, p. 171; COLOMBIA, Const., Art. 9, p. 180; COSTA RICA, Law of May 13, 1889, Art. 4 (1), p. 186; CUBA, Const., Art. 6 (1), *Gaceta Oficial*, *id.*, p. 3; DENMARK, Law of April 18, 1925, Art. V, p. 215; DOMINICAN REPUBLIC, Const., Art. 11, p. 218; ECUADOR, Const., Art. 10 (1), p. 222; ETHIOPIA, Law of July 22, 1930, Sec. 11 (A), *loc. cit.*; GERMANY, Law of Nationality, July 22, 1913, Sec. 25, p. 310; GUATEMALA, Law of Foreigners of 1894, Arts. 1, 4, 8, p. 322; HAITI, Law of Aug. 22, 1907, Art. 17 (1), p. 330; HONDURAS, Law No. 331, Art. 1 (6), p. 334; ICELAND, Law of June 15, 1926, Arts. 5, 7, p. 346; IRAQ, Law of Oct. 9, 1924, Art. 13, p. 350; ITALY, Law of June 13, 1912, Art. 8 (1), p. 364; JAPAN, Law No. 66, Art. 20, p. 334; LIBERIA, Law of Feb. 8, 1922, Sec. 73, p. 414; LUXEMBURG, Civil Code of 1807, Sec. 17, p. 420; MEXICO, Const., Art. 37 (A), I, Millan, *op. cit.*, p. 24; MONACO, Civil Code, Art. 17 (1), p. 438; NETHERLANDS, Law of Dec. 12, 1892, Art. 7 (1), p. 443; NETHERLAND COLONIES, Law of Feb. 10, 1910, Art. 2 (1), p. 447; NICARAGUA, Const., Art. 10 (1), p. 449; PANAMA, Const., Art. 7 (1), p. 458; PARAGUAY, Law No. 559, Art. 1, p. 472; PERU, Const., Art. 7 (2), *Const. Política*, *id.*, p. 3; PORTUGAL, Civil Code of 1867, Art. 22 (1), p. 491; RUMANIA, Law of Feb. 23, 1924, Art. 36 (a), p. 501; EL SALVADOR, Const., Art. 53 (3), p. 518; Law of April 3, 1900, Art. 2 (4), p. 518; SPAIN, Const., Art. 24 (2), *Gaceta de Madrid*, *id.*, p. 3; TRANSJORDAN, Nationality Law, June 1, 1928, Sec. 14, *loc. cit.*, p. 37; VENEZUELA, Law of July 13, 1928, Art. 7, p. 642.

<sup>100</sup> See the declaration by Congress of the right of expatriation in the Law of July 27, 1868, as reenacted in Rev. Stats., 1878, Sec. 1999, p. 578.

<sup>101</sup> Law of March 2, 1907, Sec. 2, p. 600; 34 Stat. 1228.

of unconditional naturalization is more strongly entrenched than the population of the countries adhering to it would seem to indicate, and yet perhaps less so than might be inferred from the number of countries. At the same time the surprisingly small extent of the rule requiring the consent of the government to loss of citizenship upon naturalization in a foreign country is distinctly encouraging to those who believe that the unlimited right of expatriation would remove a serious source of friction in international relations.

Thirteen states require the performance of military service as a prerequisite to the loss of nationality by the acquisition of the nationality of a foreign state.<sup>102</sup> Two of these states have this rule combined with the apparently contradictory rule of unconditional loss of nationality upon naturalization abroad. The Italian law contains the somewhat anomalous provision that, "The loss of citizenship in the cases contemplated in this article does not exempt one from the obligations of military service, except as regards facilities granted by special laws."<sup>103</sup> It may be added that no American states appear in this group, all of them being European, except China and Japan.

*By entering military or civil service of a foreign state, or accepting honors or protection from it.* The laws of eleven states provide for the unconditional loss of nationality upon entry into foreign military service: Austria, Bulgaria, Costa Rica, Cuba, Guatemala, Kingdom of Saudi Arabia, Netherlands, Netherlands Colonies, Peru, Poland, Rumania, Spain.<sup>104</sup> Under the laws of the following fourteen states entry into foreign military service results in loss of nationality if the national fails, on order from his government, to leave such service: Albania, Free City of Danzig, Egypt, Estonia, Finland, Germany, Greece, Hungary, Iraq, Italy, Monaco, Transjordan, Turkey, Yugoslavia.<sup>105</sup>

<sup>102</sup> BULGARIA, Const., Art. 56, p. 162; CHINA, Rev. Law, Feb. 5, 1929, Art. 12, p. 177; ESTONIA, Law No. 87, Sec. 20, p. 234; FINLAND, Law of June 17, 1927, Sec. 1, p. 239; FRANCE, Law of Aug. 10, 1927, Art. IX (1), p. 249; GREECE, Law No. 391, Art. 23 (a), p. 317; HUNGARY, Law of Dec. 20, 1879, Art. 22, p. 339; ITALY, Law of June 13, 1912, Art. 8, p. 334; JAPAN, Law No. 66, Art. 24, p. 335; LIECHTENSTEIN, Law of May 14, 1864, Art. II, par. 8 (d), *loc. cit.*; POLAND, Law of Jan. 20, 1920, Art. 11, p. 431; TURKEY, Law of May 28, 1928, Art. 7, p. 570; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 23 (1), p. 394.

<sup>103</sup> See note 102. Also see similar provision in Japanese law, note 102.

<sup>104</sup> AUSTRIA, Fed. Law No. 235, Sec. 10 (2), p. 20; BULGARIA, Law of Dec. 31, 1903, Art. 17 (3), (4), p. 166; COSTA RICA, Law of May 13, 1889, Art. 4 (2), (3), p. 186; CUBA, Const., Art. 6 (2), (3), *Gaceta Oficial*, *id.*, p. 3; GUATEMALA, Law of Feb. 21, 1894, Art. 7, p. 323; SAUDI ARABIA, Law of Sept. 24, 1926, Sec. 7, p. 331; NETHERLANDS, Law of Dec. 12, 1892, Art. 7 (4), p. 443; NETHERLAND COLONIES, Law of Feb. 10, 1910, Art. 2 (3), p. 447; PERU, Const., Art. 7 (1), *Const. Política*, *id.*, p. 3; POLAND, Law of Jan. 20, 1920, Art. 11 (2), p. 431; RUMANIA, Law of Feb. 23, 1924, Arts. 36 (d), 37, p. 502; SPAIN, Const., Art. 24 (1), *Gaceta de Madrid*, *id.*

<sup>105</sup> ALBANIA, Civil Code, Art. 12, p. 6; DANZIG, Law of May 30, 1922, Sec. 15, p. 211; EGYPT, Decree Law No. 19, Art. 13, p. 228; ESTONIA, Law No. 87, Sec. 22, p. 234; FINLAND,

Loss of nationality results unconditionally from entering the civil service or accepting public office in a foreign state under the laws of nineteen states: Albania, Argentine Republic, Austria, Bolivia, Brazil, Costa Rica, Cuba, Guatemala, Haiti, Netherlands, Netherlands Colonies, Panama, Paraguay, Peru, Poland, Portugal, Rumania, El Salvador, Spain.<sup>106</sup> In the following sixteen states loss of nationality results from entering the civil service or accepting public office in a foreign state, and failing to retire from such service or office upon orders from the government of the national concerned: Bulgaria, Free City of Danzig, Egypt, Finland, France, Greater Lebanon, Syria, Germany, Iraq, Italy, Monaco, Transjordan, Turkey, Yugoslavia.<sup>107</sup> It is cause for some surprise to find that more states impose the penalty of loss of nationality for entering the civil service or accepting public office from a foreign state, than for entering military service of such a state.

The acceptance of honors or protection from a foreign government brings about loss of nationality unconditionally under the laws of nine states: Argentine Republic, Bolivia, Costa Rica, Cuba, Honduras, Mexico, Panama, Paraguay, Portugal.<sup>108</sup> There is no provision in the laws of the United

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LAW OF JUNE 17, 1927, Sec. 3, *p.* 240; GERMANY, Law of Nationality, July 22, 1913, Sec. 28, *p.* 310; GREECE, Law No. 391, Art. 23 (b), *p.* 317; HUNGARY, Law of Dec. 20, 1879, Art. 30, *p.* 340; IRAQ, Nationality Law, Oct. 9, 1924, Art. 15, *p.* 350; ITALY, Law of June 13, 1912, Art. 8 (3), *p.* 364; MONACO, Civil Code, Sec. 17 (3), *p.* 438; TRANSJORDAN, Nationality Law, June 1, 1928, Sec. 15, *loc. cit.*, *p.* 37; TURKEY, Law of May 28, 1928, Arts. 9, 10, *p.* 571; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 32, *p.* 396.

<sup>106</sup> ALBANIA, Civil Code, Art. 12, *p.* 6; ARGENTINE REPUBLIC, Law No. 346, Art. 8, *p.* 12; AUSTRIA, Fed. Law No. 285, Sec. 10 (2), *p.* 20, Fed. Law, June 8, 1927, Art. 1, *p.* 24; BOLIVIA, Const., Art. 35 (4), *p.* 46; BRAZIL, Const., Art. 107b, Hambloch, *p.* 43; COSTA RICA, Law of May 13, 1889, Art. 4 (2), *p.* 186; CUBA, Const., Art. 6 (2), (3), *Gaceta Oficial, id.*, *p.* 3; GUATEMALA, Law of Feb. 21, 1894, Art. 7, *p.* 323; HAITI, Law of Aug. 22, 1907, Art. 17 (3), *p.* 330; NETHERLANDS, Law of Dec. 12, 1892, Art. 7 (4), *p.* 443; NETHERLAND COLONIES, Law of Feb. 10, 1910, Art. 2 (3), *p.* 447; PANAMA, Const., Art. 7 (2), *p.* 453; PARAGUAY, Const., Art. 40 (2), J. I. Rodriguez, *American Constitutions* (1905), Vol. II, *p.* 390; PERU, Const., Art. 7 (1), *Const. Política, id.*, *p.* 3; POLAND, Law of Jan. 20, 1920, Art. 11 (2), *p.* 481; PORTUGAL, Civil Code of 1867, Art. 22 (2), *p.* 491; RUMANIA, Law of Feb. 23, 1924, Arts. 36 (d), 37, *p.* 502; EL SALVADOR, Const., Art. 53 (4), *p.* 518; SPAIN, Const., Art. 24 (1), *Gaceta de Madrid, id.*

<sup>107</sup> BULGARIA, Law of Dec. 31, 1903, Art. 17 (3), (4), *p.* 166; DANZIG, Law of May 30, 1922, Sec. 15, *p.* 211; EGYPT, Decree Law No. 19, Art. 13, *p.* 223; FINLAND, Law of June 17, 1927, Sec. 3, *p.* 240; FRANCE, Law of Aug. 10, 1927, Art. IX (4), *p.* 249; GREATER LEBANON, Order No. 15/S, Art. 8 (2), *p.* 299; SYRIA, Order No. 16/S, Art. 8 (2), *p.* 301; GERMANY, Law of Nationality, July 22, 1913, Sec. 28, *p.* 311; GREECE, Law No. 391, Art. 23 (b), *p.* 317; HUNGARY, Law of Dec. 20, 1879, Art. 30, *p.* 340; IRAQ, Nationality Law, Oct. 9, 1924, Art. 15, *p.* 350; ITALY, Law of June 13, 1912, Art. 8 (3), *p.* 364; MONACO, Civil Code, Sec. 17 (3), *p.* 438; TRANSJORDAN, Nationality Law, June 1, 1928, Sec. 15, *loc. cit.*, *p.* 37; TURKEY, Law of May 28, 1928, Arts. 9, 10, *p.* 571; YUGOSLAVIA, Law of Nationality, Sept. 21, 1928, Art. 32, *p.* 396.

<sup>108</sup> ARGENTINE REPUBLIC, Law No. 346, Art. 8, *p.* 12; BOLIVIA, Const., Art. 35 (4), *p.* 46; COSTA RICA, Law of May 13, 1889, Art. 4 (2), (3), *p.* 186; CUBA, Const., Art. 6 (2), (3), *Gaceta Oficial, id.*, *p.* 3; HONDURAS, Const., Art. 22, *p.* 333; MEXICO, Const., Art. 37 (A),

States for a loss of nationality upon entering foreign military service, or foreign civil service, or accepting public office in a foreign state, or accepting honors or protection from it, unless such action involves an oath of allegiance. Loss of nationality results from taking such an oath.<sup>109</sup>

*By reason of disloyalty or bad character.* A majority of the rules included in this group relate to acts or omissions in connection with military service, such as service in the armies of enemy states, lending aid to enemies of the state, desertion from the armed forces of the state, or failure to return upon call to serve in the army in case of war, the following states having one or more such rules: Bulgaria, Chile, Ecuador, Germany, Haiti, Latvia, Panama, Poland, Turkey.<sup>110</sup>

The United States has a law, originally enacted in 1865 to punish Civil War deserters, and extended in 1912 to cover every person deserting from the military or naval service of the United States, or departing from the jurisdiction where he was enrolled to avoid any draft into military or naval service, which provides that such deserters shall be "deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens."<sup>111</sup> This actually means a forfeiture of citizenship, as the Supreme Court held in the case of *Weedin v. Chin Bow*, 274 U. S. 657, 666, in construing the term "rights of citizenship" as used in the law of Feb. 10, 1855, with respect to children born abroad of American fathers, that the "rights of citizenship" are equivalent to citizenship itself.

Two states attach the penalty of loss of nationality to subversive activities intended to injure the interests of the state, or to overthrow it, these laws apparently being aimed essentially at communistic activities. The laws of the Argentine Republic provide that loss of nationality results from conviction of the crimes of bombing and related crimes, sabotage, promoting boycotts, offending or insulting the flag, and advocating disregard for the national constitution.<sup>112</sup> According to the laws of Egypt, the nationality of one residing outside Egypt may by decree be declared forfeited if he

. . . is affiliated with an organization having for its object propaganda subversive to the social or economic order of the State or of the fundamental institutions of society or tending towards the same end through other means, or with any office, branch scholastic or other establish-

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Millan, *op. cit.*, p. 24; PANAMA, Const., Art. 7 (2), p. 458; PARAGUAY, Const., Art. 40 (2), Rodriguez, *op. cit.*, Vol. II, p. 390; PORTUGAL, Civil Code of 1867, Art. 22 (2), p. 491.

<sup>109</sup> Law of March 2, 1907, Sec. 2, p. 600; 34 Stat. 1228.

<sup>110</sup> BULGARIA, Law of Dec. 31, 1903, Art. 20, p. 166; CHILE, Const., Art. 6 (3), p. 171; ECUADOR, Const., Art. 10 (2), p. 222; GERMANY, Law of Nationality, July 22, 1913, Sec. 27, p. 311; HAITI, Law of Aug. 22, 1907, Arts. 17, 20, p. 330; LATVIA, Law of June 2, 1927, Art. VIII, p. 409; PANAMA, Const., Art. 7 (3), (4), p. 458; POLAND, Order No. 540, Aug. 11, 1920, Art. 1, p. 439; TURKEY, Law of May 28, 1928, Art. 10, p. 571.

<sup>111</sup> Law of March 3, 1865, as reenacted in Rev. Stats. 1878, Sec. 1996; law of Aug. 22, 1912, Sec. 1, amending Rev. Stats. 1878, Sec. 1998, pp. 577, 604.

<sup>112</sup> Law No. 7029, June 28, 1920, Art. 28, *loc. cit.*

ment, bureau or group which is dependent upon or attached to a similar organization in any manner whatsoever, whether the said organization or its office is situated in Egypt or abroad, as well as he, under like conditions, who becomes acquainted, through following the courses of instruction or in any other manner, with the doctrines and methods of a similar organization.<sup>113</sup>

The laws of Germany and Italy furnish interesting examples of the effort of "totalitarian" states to prevent subversive activities by nationals abroad, and are especially significant because of the sweeping character of the activities proscribed. Under Italian law, loss of nationality, with the possible additional penalty of sequestration and confiscation of property, may result from acts which may result in damage to Italian interests or the diminution of the good name and prestige of Italy.<sup>114</sup> The German law concerning the revocation of naturalization and the cancellation of German citizenship, issued July 14, 1933, provides that

Members of the Reich, who are residing abroad, may be declared to have lost German citizenship, so far as they through conduct which offends against their duty of loyalty to the Reich and people, have injured German prestige. The same applies to members of the Reich who have not obeyed a call to return, which the Reich Minister of the Interior has directed to them with reference to this regulation. With the introduction of the cancellation proceedings or with the issuance of the call to return, their property may be confiscated; after cancellation of German citizenship it may be declared as having fallen to the Reich. The confiscation of the property ends upon the expiration of two years at the latest if it has not been previously declared as having fallen to the Reich.<sup>115</sup>

The confiscation of property in such a case is within the discretion of the authorities. The sweeping and nebulous character of the authority thus granted to the administrative authorities is revealed by the terms of the decree interpreting this law: "An attitude contrary to the duty of loyalty to the Reich and people shall be deemed to exist particularly if a German has supported inimical propaganda against Germany or attempted to degrade German prestige or the measures adopted by the national Government."<sup>116</sup>

The law of Venezuela contains the unique provision that a change in nationality for the purpose of evading the consequences of any legislation is fraudulent and null.<sup>117</sup>

*By extended residence abroad.* It is noteworthy that no state provides with respect to native citizens for the unconditional loss of nationality by

<sup>113</sup> Decree Law No. 19, Feb. 27, 1929, as amended by Decree Law No. 92, June 18, 1931, enclosure with Despatch No. 208, June 26, 1931, from American Consul Bulkeley, Rameleh, Egypt, to Secretary of State.

<sup>114</sup> Law No. 108, Jan. 31, 1926, modifying Law of June 13, 1912, p. 374.

<sup>115</sup> Sec. 2 (1), *Reichsgesetzblatt*, No. 81, *id.*

<sup>116</sup> Re Sec. 2, I, *Reichsgesetzblatt*, No. 87, *id.*      <sup>117</sup> Law of July 13, 1928, Art. 9, p. 642.

extended residence abroad. The most drastic law is that of the Netherland Colonies which provides that nationality is lost by failing to give notice within three months after arrival in a foreign country to a Netherland consular official, and by omitting to repeat such notice in the first three months of each succeeding year.<sup>118</sup> This law may be discounted, however, because of the fact that it is liberal in extending Netherland nationality to natives of the colonies, and it is probably regarded as necessary to safeguard the Netherland Government from the necessity of protecting such persons, where a tie of allegiance, perhaps weak in the beginning, is further loosened by residence abroad. The next severest law, probably, is that of Luxemburg which provides that residence in a foreign country, for purposes other than business, in the absence of any intention to return, results in loss of nationality.<sup>119</sup>

Hungary provides that ten years uninterrupted absence without authority of a Cabinet minister produces loss of nationality; Netherlands, in case of Dutch nationals born abroad, that ten years residence outside the kingdom after attaining majority, unless notice of intent to retain nationality is given; Turkey, that if after five years residence abroad one fails to register with a Turkish consulate; Yugoslavia, that residence abroad for thirty years after attaining age of twenty-one, if during that time no obligations to the kingdom are performed.<sup>120</sup>

The law of the United States contains no provision with regard to the effect of extended residence abroad upon the citizenship of a native born citizen, or upon his right to diplomatic protection, no matter what the length of such residence may be.<sup>121</sup> Diplomatic protection may be refused, however, to a native citizen, who, having taken up a permanent residence abroad, and having identified himself with the community life of his adopted home fails to maintain effective ties with the United States, or to furnish some other valid explanation of his continued residence abroad, such as reasons of health.

A stricter rule, in general, with respect to loss of nationality by nationals

<sup>118</sup> Law of Feb. 10, 1910, Art. 2 (4), p. 447.      <sup>119</sup> Civil Code of 1807, Sec. 17 (3), p. 420.

<sup>120</sup> HUNGARY, Law of Dec. 20, 1879, Art. 31, p. 340; NETHERLANDS, Law of Dec. 12, 1892, Art. 7 (5), p. 443; TURKEY, Law of May 28, 1923, Art. 10, p. 571.

<sup>121</sup> "The Department holds that for a native American to put off his national character he should put on another. Continued residence of a native American abroad is not expatriation, unless he performs acts inconsistent with his American nationality and consistent only with the formal acquirement of another nationality. . . . Existing statutes confirm the principle by providing that citizenship shall flow to the children of American citizens born abroad, the birthright ceasing only with the grandchildren whose fathers have never resided in the United States. Foreign residence, even for two generations, is, therefore, not necessarily expatriation, in the sense of renouncing original allegiance, nor is it necessarily repatriation unless through the conflict of laws of the respective countries and the conclusion of conventional agreements between them." Mr. Evarts, Sec. of State to Mr. Fish, chargé d'affaires to Switzerland, Oct. 19, 1880, For. Rel. 1880, 960. John Bassett Moore, *A Digest of International Law*, Vol. III, p. 717.

residing permanently abroad would be an innovation of undoubted desirability. It is difficult to see why a person who becomes permanently established in a foreign country and identified with the life of the community in which he lives, should be allowed to continue to carry the badge of allegiance of a country with which he has little or no effective contact. The chief difficulty which would arise out of a more widespread adoption of the rule of loss of nationality for such residence abroad lies in the fact that few, if any, states provide for the acquisition of nationality by the bare fact of residence. This difficulty is more apparent than real, however, as almost all states provide for naturalization upon the voluntary initiative of the individual after a prescribed period of residence, usually comparatively short. As a practical matter, it must be recognized that there is little prospect for the adoption of stricter rules with respect to residence abroad because of the desire of most states to extend rather than to restrict the number of persons to whose allegiance as nationals they may lay claim.<sup>122</sup>

Falling short of rules for the loss of nationality for extended residence abroad, a rule limiting the right of such persons to diplomatic protection, especially as against the state in which they live, would be of considerable value in removing a serious source of friction in international relations. By excepting from this rule those whose residence abroad resulted primarily in promoting the interests of their native country, and in this connection care would have to be taken to avoid confusing the interest of a few individuals with the interest of the state as a whole, no state enforcing such a rule would suffer from its application.

### Conclusion

Perhaps the most striking fact revealed by this analysis of the nationality laws of the various states is the widespread extent of the rule of *jus sanguinis*, and its paramount influence upon the law of nationality throughout the world. That this fact, combined with the meagre and inadequate laws for the termination of dual nationality acquired at birth, creates a problem of primary importance there can be little doubt. The real obstacle to progress in the extension and improvement of these laws, however, is primarily political, rather than legal, namely, the intense ambition of nearly all states to maintain, and to increase if possible, their present man power as a guarantee of security in the midst of the existing frenzy of insecurity and nationalism.

Another fact of considerable interest is the relatively incomplete nature of the statutory law on nationality in a large number of the states studied. There are gaps in the laws of a very considerable number of states. However, it is even more significant that the United States is about the only one

<sup>122</sup> Dean John H. Wigmore has made the interesting, but extreme, suggestion that citizenship be based on domicile and that two years' residence in a country shall automatically result in an election of the citizenship of that country. See his article, "Domicile, Double Allegiance, and World Citizenship," 21 Ill. Law Rev. (1927), 761.

of the states of any consequence that does not have a comprehensive nationality law. All the great Powers, save Russia, have had their present laws for a number of years: Great Britain (1914), France (1927), Italy (1912), Japan (1899), Germany (1913). In a way this has its advantages, for the United States now has the opportunity of drawing upon the experience of all these Powers in codifying their laws.

## EDITORIAL COMMENT

### SECRETARY HULL'S TRADE AGREEMENTS

The recently concluded trade agreements with Cuba, Brazil, and Belgium are of unusual interest from several points of view. In the first place, they are the first fruits of the Administration's policy to lower trade barriers in order to revive international commerce and thereby materially to assist economic recovery. They indicate that Secretary of State Hull has succeeded in his efforts to negotiate agreements based upon the unconditional most-favored-nation clause. His contention is that this will be in line with the American policy of the open door in trade relations and will aid us in resuming our triangular trade without which we may be subjected to the strangulation of the bilateral balancing system, which seeks to equalize the value of exports and imports between each pair of countries. It is argued that this latter system tends to national isolation and would in last analysis deprive the world of the benefits of industrial improvements made in the different countries, to say nothing of the friction and international irritation by which such a readjustment would be accompanied. As Assistant Secretary of State Sayre has said:

In the dynamic world in which we live, a policy of progressive economic nationalism, if unchecked, will result in independent price structures in all countries. Maintenance of that independence in prices will, in turn, require insulation; that insulation will ultimately become isolation. Under a system of isolated national price structures the great gains in productive technique in each country would be lost to the rest of the world, with a consequent lowered standard of living for all.<sup>1</sup>

The Belgian agreement, which constitutes a notable step in the direction of the policy of leveling international trade barriers, evinces, nevertheless, a praiseworthy caution in regard to avoiding any serious and unexpected injury to our national economy. Although it runs for an indefinite period, it may be terminated on six months' notice, and it provides:

(1) In the event that a wide variation occurs in the rate of exchange between the currencies of the United States of America and the Belgo-Luxemburg Economic Union, the Government of either country, if it considers the variation so substantial as to prejudice the industries or commerce of the country, shall be free to propose negotiations for the modification of this Agreement or to terminate it on thirty days' written notice.

(2) The Government of each country reserves the right to withdraw the concession granted on any article under this Agreement, or to impose

<sup>1</sup> Address before the American Association for the Advancement of Science, Pittsburgh, Dec. 31, 1934.

quantitative restrictions on any such article if at any time there should be evidence that, as a result of the extension of such concession to third countries, such countries will obtain the major benefit of such concession and in consequence thereof an unduly large increase in importations of such article will take place: Provided that before the Government of either country shall avail itself of the foregoing reservation, it shall give notice in writing to the other Government of its intention to do so, and shall afford such other Government an opportunity within thirty days after receipt of such notice to consult with it in respect of the proposed action; and if an agreement with respect thereto is not reached within thirty days following receipt of the aforesaid notice, the Government which proposes to take such action shall be free to do so at any time thereafter, and the other Government shall be free within fifteen days after such action is taken to terminate this Agreement in its entirety on thirty days' written notice.

These limiting provisions do not prevent the agreement from constituting a real achievement in the face of almost unsurmountable difficulties. It should help to revive trade not only between the signatories but, to some extent also, with other countries. Secretary Hull has announced that agreements are being negotiated or contemplated with other states. The announced list includes the following European countries: Sweden, Spain, Switzerland, The Netherlands, Finland, and Italy. On this continent an important negotiation is that announced on January 21, with Canada.

In the second place, these trade agreements are of especial interest because they were concluded under the very broad Congressional delegation of authority to the President without requirement of the concurrence or consent of the legislative branch of the Government. The enabling Act<sup>2</sup> bases this delegation of authority upon the existence of an emergency and the obvious need of reviving our foreign trade, and by its terms has been careful to limit the duration of the grant to three years. The agreements themselves may not run for a longer period, although they may be continued by tacit consent, subject to denunciation upon not more than six months' notice. Congress has further limited its authorization of the executive action by providing that the President may, in order to facilitate the negotiation of these agreements, vary the "duties and other import restrictions" by not more than 50 per cent. up or down the scale, and no article may be transferred from the dutiable to the free list or *vice versa*. Although such modifications of existing tariff rates are made to apply equally to all foreign countries, the President may suspend the benefits of such modifications to any country discriminating against American commerce. This gives him an effective means to induce other countries to enter the field of operation of the unconditional most-favored-nation clause.

The delegation of such broad powers, even when so limited, indicates a growing realization of the fact that those who negotiate our trade agree-

<sup>2</sup> Act approved June 12, 1934. This Act was in the form of an amendment to the Tariff Act of 1930.

ments must be placed in the same advantageous position as are the negotiators in foreign states. They must be able to act with dispatch and to make commitments which do not run the risk of being made the football of internal politics perhaps with the result that the agreement may fail of ratification.

The enabling Act contains another limitation which denies to the President in the negotiation of these agreements any "authority to cancel or reduce, in any manner, any of the indebtedness of any foreign country to the United States." The wisdom of this limitation may be questioned. Why should we nurse a grievance which may be perpetuated indefinitely, when we might find a favorable opportunity to bury it in the provisions of a trade agreement to the benefit of more cordial relations between the States concerned and possibly with an additional advantage derived from some compensating concessions in return for such cancellation? We are not likely to gain by insisting upon our strict right. For pure folly, it would be hard to equal the conduct of these debt negotiations by all parties concerned.

In the third and last place, these trade agreements are important because of the extremely interesting and effective machinery evolved for the purpose of their negotiation. It was first necessary for the Government to decide what general policies it should adopt and what methods it should employ to carry them out. This high function was entrusted to an Executive Committee on Commercial Policy, with Assistant Secretary of State Francis B. Sayre as chairman, and one or more representatives from the departments or agencies particularly concerned in the negotiation of foreign trade agreements.<sup>3</sup>

The organization responsible for the trade agreements program centers around the Interdepartmental Committee on Foreign Trade Agreements, of which Mr. Henry F. Grady is chairman. On this committee are representatives of the departments and governmental agencies specially interested in the negotiations, and through their representation the information and facilities of all the governmental agencies interested in tariffs and other measures affecting our foreign trade are utilized and coordinated. The names of the members of this committee, except that of the chairman, are not made public, so that they may be free from the importunities of individ-

<sup>3</sup> This committee was first constituted by a Presidential letter dated Nov. 11, 1933, and later by Executive Order No. 6656, March 27, 1934. As a former legal adviser of the Siam Government, Mr. Sayre has had wide experience in treaty negotiation. The other members of the Executive Committee from the State Department are Economic Adviser Herbert Feis, and Mr. Henry F. Grady, Chief of the Trade Agreement Section. From the Treasury, George C. Haas; from Commerce, Assistant Secretary John Dickinson, Mr. Claudius F. Murchison, Director of the Bureau of Foreign and Domestic Commerce; from Agriculture, Under Secretary Rexford G. Tugwell, Mr. Leslie A. Wheeler, in charge of the Bureau of Foreign Agriculture Service; Agriculture Adjustment Administration, Mr. L. R. Edminster; N.R.A., Mr. H. B. Gresham; Tariff Commission, Chairman Robert L. O'Brien, Mr. Oscar B. Ryder; Special Advisor to the President on Foreign Trade, Mr. George N. Peek.

uals interested in the negotiations and be able the better to serve the general public interest. The Interdepartmental Committee appoints subcommittees or Country Committees for each country.

Directly under the supervision of Assistant Secretary of State Sayre there has been created in the Department of State a Trade Agreement Section, of which Mr. Henry F. Grady, chairman of the Interdepartmental Committee of Foreign Trade Agreements, is chief. This section acts as an office or bureau for the Interdepartmental Committee and assumes the burden of the administrative details incident to the preparation and conduct of the negotiations with the representatives of the different governments. It also coordinates the efforts of the several interested divisions of the State Department as well as the governmental agencies above indicated.

The Department of Commerce makes the preliminary studies and recommendations for consideration by the Country Committees relative to the concessions that may be asked from that foreign country, and the Tariff Commission studies what concessions may be granted. On the basis of the recommendations thus formulated, the Department of State initiates exploratory conversations with the governments of the countries with which trade agreements are contemplated. If it appears that there are definite possibilities of arriving at mutually advantageous trade agreements, public announcements are made that this Government intends to negotiate such agreements with the countries concerned, and provision is made for receiving the views of all persons interested in the proposed agreements.

That "reasonable public notice of the intention to negotiate an agreement" may in accordance with the terms of the Act "be given in order that any interested person may have an opportunity to present his views," the President has constituted a Committee for Reciprocity Information, composed of representatives from the different departments and agencies, with a chairman designated from among the members of the committee. Mr. Thomas Walker Page, Tariff Commissioner, has been so designated.<sup>4</sup> Thirty days before the conclusion of an agreement, the Secretary of State is required to publish in the press and certain official publications a notice of that intention. It would of course be impracticable to notify interested individuals as such, but the Department of State gives to the press a carefully prepared statement of the exports and imports from the country concerned with the expectation that those interested will take heed and present any written or oral representations they may choose to the Committee on Reciprocity Information in conformity with the regulations governing the procedure of the committee. Thereafter the chairman prepares digests of briefs, oral views and correspondence for the use of the Country Committees referred to above. These digests make available to the Country Committees the criticisms, suggestions, and technical information received by the Committee for Reciprocity Information from producers, manufacturers,

<sup>4</sup> Executive Order No. 6750, June 27, 1934.

importers, exporters, and trade associations interested in the agreements. Every article or item of interest in the trade with the particular country is carefully studied and the information brought together in a compact and readily available form. One set of volumes contains the data relative to articles which the other country exports or might export to us, while another set of volumes includes similar information in regard to articles which we might ourselves expect to export to that country.

This comprehensive and necessarily somewhat complicated machinery for the successful conclusion of our trade agreements has been made to work with remarkable dispatch and effectiveness because the supervision of all the details of negotiation is centered in the Department of State and placed under the direction of a thoroughly competent expert in the matter. This expert, Chairman Grady,<sup>5</sup> is himself directly under Assistant Secretary of State Sayre, who presides over the discussions of the important policy-forming committee, and every decision of policy as well as each important step of the negotiation is through this contact or channel communicated to Secretary of State Hull and through him to the President. At each step the appropriate governmental department or agency is consulted for the technical information required, but the Department of State rightly assumes the responsibility for coördinating this information and conducting the actual negotiations. It is impossible to divorce foreign commercial relations from foreign policy, and the Administration is to be congratulated upon this appropriate division of the work between the Department of State and the Department of Commerce, with the coöperation of all the other governmental agencies concerned. We shall await with interest the further development of the commercial policy which Secretary of State Hull has initiated through the conclusion of the Brazilian and Belgian trade agreements.

ELLERY C. STOWELL

#### INTERNATIONAL LAW AND INTERNATIONAL TRADE

The advice of a prominent publicist, whose "liberal" views have long been familiar to the American public, that the United States should abandon its past policies in respect to the promotion of foreign trade and turn its attention to the development of its natural resources and its industrial technique within the range of its own domestic market, calls attention once more to the need of examining the principles of international law in the light of inter-

<sup>5</sup> Grady, Dr. Henry Francis, Professor of International Trade and Dean of College of Commerce, University of California, 1928-34. In addition to holding several other academic positions, he was special expert of the United States Shipping Board, 1918-19; United States trade commissioner in Europe to report on post-war financial conditions, 1919-20; acting commercial attaché at London, August 1919-February 1920, and at The Hague, April-July 1920; and acting chief of Division of Research, Bureau of Foreign and Domestic Commerce, 1921.

national economic relations. Mr. Beard is convinced that the appeal of certain economists to restore the old economic order of interdependent nations as the condition of national prosperity is a mistaken one. There was never any such order, asserts Mr. Beard, there was only the anarchy of competition and rivalries between the leading nations. Hence instead of attempting to restore what never existed, let us supplant the policy of seeking to maintain an open door in foreign markets by a policy of opening the door of opportunity at home.<sup>1</sup>

The frankness with which a policy of economic nationalism for the United States is proposed by its advocates renews a challenge made to international law a generation ago but still evaded by statesmen and publicists. Too many international lawyers are still delimiting the field of their concern to the traditional problems of international intercourse and refusing to recognize the necessity of extending their inquiries into the economic causes of conflicting national interests. As well might the constitutional lawyer confine himself to a legalistic approach to his problem and apply due process of law to the issues of today as it was applied to issues at the beginning of the century. To do so is to consider legal problems in the vacuum of mental abstractions, it is to refuse to look upon the law as a living growth which must either adapt itself to the changing needs of the international community or else be swept aside by the rising forces of economic anarchy.

No one can witness the struggle that is going on among the larger industrial nations for greater economic security without realizing that if it continues along its present course it is so directly promotive of political conflict that no machinery of arbitration or conciliation will be able to solve the disputes to which it gives rise. The need an industrial state is under of assuring an adequate supply of essential raw materials becomes the more pressing as new measures are taken by neighboring countries to control their output for the sake of raising prices or of conserving natural resources. The competition for foreign markets becomes more acute with the devaluation of national currencies and with the problem of unemployment pressing all the harder upon governments to increase their exports and restrict their imports. The inability of governments in a time of financial depression to meet the obligations of external loans has dried up the sources of credit formerly relied upon to develop international trade. These are familiar aspects of international competition of recent years, but their familiarity has not led international lawyers as a group to take up the problem and lend their aid to the economists who have sought on one occasion or another to meet the issue.

It is indeed a problem of constructive statesmanship of the highest order with which we have to deal. Even within our own country we are witnessing

<sup>1</sup> *The Open Door at Home. A Trial Philosophy of National Interest.* By Charles A. Beard, with the collaboration of G. H. E. Smith. New York: The Macmillan Co., 1934. pp. xii, 331. Index. \$3.00.

the difficulties of formulating a law of interstate trade which will equalize to some degree the competition between sections of the country in which high labor standards prevail and those which have cheap labor available, between advanced and backward agricultural communities, between the small producer and the highly organized industrial unit. But the difficulties of the problem at home are at the same time an encouragement to action in the larger field of international economic relations. The analogies and parallels between the two fields, while not so close as to permit too ready inferences from one to the other, nevertheless throw considerable light upon the methods of approach and the feasibility of the particular forms of regulation. An "interstate commerce" law for the nations is so indispensable that the formulation of its fundamental principles must become a subject of immediate concern to international lawyers and its study must be pursued unremittingly until a solution be found.

Policists have on more than one occasion called attention to the intimate connection between political and economic security and to the necessity of supplementing pacts of political non-aggression with pacts of economic non-aggression. It is an interesting academic question whether political stability in international relations is a condition precedent to economic recovery or, on the other hand, economic recovery is a condition precedent to political stability. As a practical matter, the two are interdependent and their causes and effects are so closely interwoven as to make it impossible to determine at times whether a particular measure bears more upon the one than upon the other. A marked revival of foreign trade would undoubtedly do a great deal towards lessening the present situation of political tension; and, on the other hand, it is equally clear that if the political situation could be brought to a greater degree of stability it would release forces that would have an immediate effect in stimulating world trade. As for the policy of the United States, Professor Wright has emphasized forcibly in the recent Report on International Economic Relations that the present efforts that are being made to promote domestic recovery should be entered upon with a due care to avoid creating distress and resentment abroad or a shock to the world's political equilibrium.

C. G. FENWICK

#### GERMAN REARMAMENT AND UNITED STATES TREATY RIGHTS

In September, 1934, the Department of State issued a Press Release<sup>1</sup> entitled, "Exportation of Arms and Munitions to Germany," in which a

<sup>1</sup> Saturday, Sept. 22, 1934, Weekly Issue 260, Publication No. 641. The Press Release ends as follows: "That as the United States under the provisions of Articles I and II of the Treaty of Berlin enjoys all the advantages stipulated in Arts. 170 and 198 [of the Treaty of Versailles] the importation of military aircraft into Germany or the possession or use of aircraft by the German police would constitute a violation of the treaty rights of this Government."

letter to an aircraft manufacturer was quoted expressing the Department's opinion that under Article 170 (included in Part V) of the Treaty of Versailles,<sup>2</sup> alleged to have been incorporated by reference in the Treaty of Berlin,<sup>3</sup> the exportation of military airplanes from the United States to Germany would be a violation of Article 170, and hence "a violation of Germany's treaty obligations to the United States." More recently, a part of the American press has taken the position that the rearmament of Germany is a violation of Part V of the Treaty of Versailles and hence a violation of the Treaty of Berlin with the United States.

These conclusions are of so portentous a nature that it is well to examine them more closely. Apart from the fact that the British Government, a direct party to the Treaty of Versailles, appears to have taken the position that the sale and export to Germany of airplanes and parts, and even of engines to be used for military purposes, was not a violation of any treaty engagement between Germany and Great Britain,<sup>4</sup> the assumption that the disarmament of Germany under the military clauses of Part V of the Treaty of Versailles is included among the "rights, privileges, indemnities, reparations or advantages" which the United States reserved to itself in the Knox-Porter Resolution of July 2, 1921,<sup>5</sup> or which, according to the Treaty of Berlin, were "stipulated for the benefit of the United States in the Treaty of Versailles" seems destitute of foundation, either in law or in fact.

The United States had found much difficulty in coming to a state of peace with Germany. A simple repeal of the declaration of war would have accomplished that result. After President Wilson's veto of a 1920 peace resolution,<sup>6</sup> the Knox-Porter Resolution was adopted in 1921 after the Senate had clearly indicated its intention to avoid all the military and political commitments of the Treaty of Versailles while reserving to the United States and its citizens all the "rights, privileges, indemnities, reparations or advantages" of a pecuniary or economic kind which the Treaty of Versailles had conferred upon the Allied governments or its nationals. Inasmuch as the words quoted were carried into the Treaty of Berlin,<sup>7</sup> it becomes important to determine what Senator Knox, the author of the words, considered to be the substance of the "rights, privileges, indemnities, reparations or advantages" which, among the reserved parts of the Treaty of Versailles, were deemed a "benefit" to the United States.

<sup>2</sup> Art. 170 reads in part: "Importation into Germany of arms, munitions and war materials of every kind shall be strictly prohibited."

<sup>3</sup> See text in 61 Cong. Rec. 5769 (1921); 42 Stat. L. (67th Cong., 1st Sess.), 1939; this JOURNAL, Supplement, Vol. 16 (1922), p. 10.

<sup>4</sup> See article in *New York Times*, Sept. 19, 1934, at 8, col. 4, reporting statements of Sir John Simon in the House of Commons; *London Times*, Sept. 18, 1934, at 12, col. 3; *ibid.*, Sept. 19, 1934, at 10, col. 3; Sir John Simon, May 14, 1934, in House of Commons, *London Times*, May 15, 1934, at 8, col. 4; 41 Current History, 200 (Nov. 1934).

<sup>5</sup> 61 Cong. Rec. 3299; 42 Stat. L. (67th Cong., 1st Sess.), 1921, Public Laws, p. 105.

<sup>6</sup> 59 Cong. Rec. 5129; *ibid.*, p. 7102; *ibid.*, p. 7429.

<sup>7</sup> Art. I.

Senator Knox explained the terms used as follows:

By the treaty [of Versailles] we became, as one of the principal allied and associated powers, with our associates co-owners of the following property, rights and privileges: A part of German territory in Europe and all of Germany's territorial overseas possessions; of parts of Schleswig in trust for Germany or Denmark; of all the German national property, imperial and state, and the private property of the ex-Emperor and other royal personages, without compensation for that in the colonies, with compensation for that in Memel; of the public utilities in areas ceded to the principal allied and associated powers; of all German cables, reaching all over the world; of practically all German merchant marine shipping and of certain portions of her inland shipping; of bonds in the total fixed amount of 100,000,000,000 gold marks, and of a commitment for an indefinite further issue; of certain amounts of gold specified; of German claims against Austria, Hungary, Bulgaria and Turkey; of a maximum of 200,000 tons of shipping per year to be built by Germany; and as single owner in our own right of all American securities, certificates, deeds or other documents of title, including shares of stock, debentures, debenture stocks, or other obligations of any company incorporated in accordance with our laws, as also all materials, and so forth which may have been taken from our citizens during the war.

By this same treaty our citizens became the beneficiaries, fully and completely, with the nationals of other allied and associated powers, of *restrictions accepted*, grants made, and obligations incurred by Germany with reference to her external commerce in the matter of duties, charges, and commerce restrictions, reciprocity treaties, customs provisions, shipping, freedom of transit, free zones, the internationalization of her great internal waterways, railway transit, and the Kiel canal. We are likewise the beneficiary of the principle accepted by Germany that Germany is responsible for herself and for her allies, for all loss and damage to which the allied and associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies, and this includes—under the broad wording of the provision—not alone the loss and damage resulting from the operation of Germany and her allies, but loss suffered as the result of the [acts of the] allied and associated powers.

While not now waiving our rights to all the foregoing, *ultimately we want, sir, only those parts which will provide for the compensation of our citizens for the losses they suffered because of the war, and those parts which will assure them equality of treatment with the nationals of the most favored nation in all matters pertaining to residence, business, profession, trade, navigation, and commerce.* It is to secure these, which we have a right to expect and demand, that the proviso of the resolution before us is drafted.<sup>8</sup>

It is evident from this recital that the rights thus reserved comprised reimbursement for past losses suffered by or assurance of future commercial

<sup>8</sup> 59 Cong. Rec. 6566, May 5, 1920. Italics supplied. The proviso related to the retention of German private property until suitable provision had been made for the satisfaction of all claims of American nationals, etc.

advantages for the United States and its citizens. The most liberal construction cannot read into these "benefits" or "advantages" any reference to the disarmament of Germany.

It is true that the Treaty of Berlin, in mentioning the several parts of the Treaty of Versailles, from which as a reservoir might be claimed the rights and advantages deemed of benefit to the United States,<sup>9</sup> includes also Part V, the military clauses. Many of the Senators were disturbed by the inclusion of this Part V in the reservoir, for most of those who spoke deemed the Part a liability and danger, and hardly a source of benefit or advantage. Some thought the United States might have to enforce it, which they claimed the American people would never support; some thought that as the Council of the League of Nations was the permanent agency for the enforcement of Part V we might have to coöperate in this respect with the League, which it was thought we had decided not to do. Inasmuch as the United States agreed to avail itself of the "rights" and "advantages" accorded it "in a manner consistent with the rights accorded to Germany under such provisions,"<sup>10</sup> Senator Walsh, who considered Part V nothing but a liability, advanced the argument that the United States would morally have to come to the aid of the country we had helped to disarm, were she attacked. Senator Borah thought that it was a source of confusion to leave in the treaty any reference to Part V. Only Senators Kellogg and Pomerene seemed to suggest that the disarmament of Germany was of any benefit to the United States, but even they were hardly purporting to interpret the Knox reservation of "rights, privileges, indemnities, reparations or advantages."<sup>11</sup> But as Part V was long and involved, and as all the Parts named were merely optional sources for the identification of specific claims and benefits, Part V was not struck out, partly on the assurance that the fears of contracting military or political liabilities were not justified. In the light of the fact that it took three years after the Armistice to make formal peace with Germany, it seems unfortunate that a treaty could not have been drafted which was clear, precise and unambiguous. The very looseness of the reference to Part V, read independently of the history of the evolution of the treaty, invites such awkward interpretations as the Press Release embodies.

Apart, however, from the history of the clause "rights, privileges, indemnities, reparations or advantages," the legal principles of *noscitur a sociis* or

<sup>9</sup> Art. II, Sec. 1, reads: "With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties: (1) that the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

<sup>10</sup> Treaty of Berlin, Art. II, Sec. 1, par. 2.

<sup>11</sup> The debates will be found in 61 Cong. Rec. 173, 183, 8327, 748, 838, 2455, 5776, 6379, 6403, 6059, 5861, 6366, 6248, 6251, 6334, 6332, 5772.

*ejusdem generis*,<sup>12</sup> and the maxim that "He who considers merely the letter of an instrument goes but skin deep into its meaning"<sup>13</sup> would seem to foreclose the conclusion that the disarmament of Germany was deemed a "right, privilege, indemnity, reparation or advantage" to the United States. Considering that the United States by the Treaty of Berlin sought to escape European entanglements and the military and political commitments of the Treaty of Versailles, it would seem extraordinary that it had nevertheless by mentioning Part V in the reservoir from which "rights" and "advantages" might be claimed, committed itself legally to the military and political disabilities on Germany and the obligations and liabilities of enforcement which that Part contemplated.

On February 3, 1935, Great Britain and France undertook to release Germany from the obligations of Part V of the Treaty of Versailles on certain conditions. The United States Government, it is understood, was not consulted in this renunciation, nor was its consent asked or given. It seems hardly conceivable that the United States consent would not have been asked had it been assumed by the Allied governments or by the United States that we were a party to Part V of the Treaty of Versailles. The entire historical development of the peace negotiations with Germany and the conclusion of the separate Treaty of Berlin with its source in the Knox-Porter Resolution, would seem to make it clear that the "rights, privileges, indemnities, reparations or advantages" stipulated for the benefit of the United States in the Treaty of Versailles and incorporated by reference in the Treaty of Berlin, did not include the disarmament of Germany and that hence the rearmament of Germany, whatever one may think of it, does not affect or violate the Treaty of Berlin.

EDWIN M. BORCHARD

#### RUSSIAN CLAIMS NEGOTIATIONS

It would be interesting to check up the number of international agreements entered into in perfect good faith on each side yet representing serious misunderstandings between the parties as to the exact meaning and effect of the terms agreed upon. The number of international agreements which have been submitted to arbitration for interpretation suggests that a surprisingly large percentage are defective in that respect. Perhaps many of them would not have been concluded unless susceptible of diverse interpretation to suit the desires of the respective parties.

<sup>12</sup> 2 Sutherland, Statutes and Statutory Construction (2d ed. 1924), Sec. 414; McNair, "Application of the *Ejusdem Generis* Rule in International Law," 5 British Year Book of International Law (1924), 181.

<sup>13</sup> *Qui haeret in litera haeret in cortice*. Broom's Legal Maxims, 8th Ed. by J. G. Pease, London, 1911, p. 533, citing Coke's Littleton 283 b. See also St. Paul's proverb, "the letter killeth but the spirit giveth life," Corinthians, II, ch. 3, verse 6, cited by John Bassett Moore in connection with another question of treaty interpretation, in International Law and Some Current Illusions, New York, 1924, p. 20.

At all events, the arrangements agreed upon between the Governments of the United States and Russia at the time the former extended official recognition to the latter in November, 1933, are now found to have been very differently understood and interpreted by the respective parties.

In the negotiations for the recognition of Russia, it was agreed that the arrangement was preparatory to a final settlement of "the claims and counterclaims between the two Governments and their nationals," and it was understood that one of the principal purposes of the arrangement was to secure the "settlement of all outstanding questions, including claims and other indebtedness."<sup>1</sup>

At the close of the negotiations, which resulted in the recognition of Russia, it was formally announced by the representatives of both Governments that—

In addition to the agreements which we have signed today [November 16, 1933], there has taken place an exchange of views with regard to methods of settling all outstanding questions of indebtedness and claims that permits us to hope for a speedy and satisfactory solution of these questions, which both our governments desire to have out of the way as soon as possible.

The claims settlement negotiations contemplated in this arrangement were soon thereafter undertaken, and a series of conferences followed, beginning in Russia and shifting afterwards back and forth between Washington and Moscow, until finally it was discovered that there was no possibility of reaching an agreement and probably never had been. The final conference was held in Washington on January 31, 1935.

The proposed terms of settlement discussed at these conferences have not been made public, but it appears from press reports and fragmentary official statements made from time to time that Russia expected the United States to make a cash loan sufficient to pay all the American claims, and this the United States was unwilling to do. It also appears that the United States' counter-proposal contemplated the establishment of substantial credits for Russia's account sufficient to finance the purchase of commodities in the United States for export to Russia, as a revolving fund which would carry an unusually high rate of interest designed on a long term basis to reimburse the United States Government for the credits advanced. An Export-Import Bank to carry out this plan was authorized and organized by the United States Government.

It does not appear why there should have been any misunderstanding at the outset, or even before these negotiations were undertaken, as to the respective positions of the two Governments in view of the great difference and conflict between their respective proposals, as promptly disclosed in the negotiations.

<sup>1</sup> See editorial comment "Recognition of Russia," Chandler P. Anderson, this JOURNAL, Vol. 28 (1934), p. 96.

It does not appear what amounts, if any, were fixed or proposed, as the total to be paid in settlement of claims or credits to be authorized.

At the close of the final negotiations the Secretary of State announced:

The Government of the United States indicated its willingness to accept in settlement of all claims of the United States and its nationals against the Soviet Government and its nationals (and of all claims of the Soviet Government and its nationals against the United States and its nationals) a greatly reduced sum to be paid over a long period of years. The Government of the United States indicated that it would accept payment through the application of a rate of interest beyond the ordinary rate of interest on credits extended to the Soviet Government with the financial assistance of the Government of the United States. To facilitate the placing of orders in the United States by the Soviet Government on a long-term credit basis, the Government of the United States was prepared to make, through the Export-Import Bank, to American manufacturers and producers requiring financial assistance in connection with the granting of credit on such orders, loans to a very large percentage of the credit granted. It was contemplated that the length of the credit extended would vary according to the different categories of goods, and the Soviet Government was advised that the Government of the United States was not averse to making special terms in exceptional cases at the President's discretion. It was intended that the loans extended to American manufacturers and producers should constitute a revolving fund for the continuous maintenance of Soviet purchases in the United States.

We hoped confidently that this proposal would prove entirely acceptable to the Soviet Government, and are deeply disappointed at its rejection. In view of the present attitude of the Soviet Government, I feel that we cannot encourage the hope that any agreement is now possible. I say this regretfully because I am in sympathy with the desire of American manufacturers and agricultural producers to find a market for their goods in the Soviet Union, and with the American claimants whose property has been confiscated. There seems to be scarcely any reason to doubt that the negotiations which seemed so promising at the start must now be regarded as having come to an end.

One of the important inducements for entering into the arrangements on which recognition was based was the expectation that as a result American industrial interests would be provided with a larger market for their goods, and that trade between the two countries would be greatly stimulated. It now appears, however, that, on the contrary, ever since the Soviet Government was recognized imports from the United States have steadily diminished.

As part of the background of this situation, it must be recalled that in 1924 Great Britain and France recognized the Soviet Government as the *de jure* Government of Russia. In each case recognition was predicated on understandings and pledges similar to those underlying recognition by the United States. In each of those cases, as in the case of recognition by the United States, considerations of economic and trade advantages formed an important part of the inducements for granting recognition, but in both

of the earlier cases, foreshadowing the same result in the later case, the conditions attached to the granting of recognition were not satisfactorily carried out. For this reason diplomatic relations were broken off by Great Britain in 1927, but were renewed two years later in consequence of renewed assurances of more friendly action on the part of Russia.

The basic principle of Soviet international relations up to the present time seems to be that the observance of the usual diplomatic and commercial intercourse between nations must be purchased by an international loan to Russia.

In connection with the recognition negotiations it is also to be noted that one of the pledges given by the Russian Government in the negotiations for recognition was "not to permit the formation or residence on its territory of any organization or group, and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group, which has as an aim to overthrow, or the preparation for the overthrow of, or the bringing about by force or a change in the political or social order of the whole or any part of the United States, its territories or possessions."

As the result of a series of hearings on un-American activities before a subcommittee of the Foreign Affairs Committee of the House of Representatives, a report has been filed, under date of February 15, 1935, challenging the good faith of the Russian Government in carrying out the pledge above quoted. This report is, in part, as follows:

The date of this pledge was November 18, 1933. Despite this pledge, about the middle of December 1933, within a month after this pledge by Maxim Litvinoff and his government, the executive committee of the Communist Internationale, sitting at Moscow, Soviet Russia, adopted resolutions of the "Thirteenth Plenum of the Executive Committee of the Communist Internationale", which are applicable to the whole world, and of course to this country, which stated:

There is no way out of the general crisis of capitalism other than the one shown by the October revolution. (In Soviet Russia when the Communists overthrew the then existing government of Russia by force.) Via the overthrow of the exploiting classes by the proletariat, the confiscation of the banks, the factories, the mines, transport, houses, the stock of goods of the capitalist, the lands of the landlords, the church, and the crown.

This resolution was approved and adopted on January 16-17, 1934, by the Central Committee of the Communist Party, at New York City, and by the National Convention of the Communist Party at Cleveland, Ohio, in April 1934, at which convention there were present 470 voting and associate delegates.

\* \* \* \* \*

The oppositions of the philosophies of communism and the American ideals of democracy are so direct and so fundamental that they cannot

exist together. Communism, moreover, is of foreign origin and is directed by an alien organization outside of the United States.

\* \* \* \* \*

Opposed to our present form of government we see the un-American character of the Communist Party in the United States. It is a party recognized on an international scale, governed and controlled by a constitution and rules emanating from the "Communist Internationale", with headquarters at Moscow in the Soviet Union, and dedicated to the overthrow of government by violence and force.

\* \* \* \* \*

The Communist Party of the United States is a section of this Internationale. As such, it is subject to the control and direction, first, of the World Congress of the Communist Internationale and, second, of the executive committee of that body. The Internationale control of the Communist Party of the United States is intimate, membership in that party being open only to

those who accept the program and rules of the given Communist Party and of the Communist Internationale, who join one of the basic units of a party, actively work in it, abide by all the decisions of the party and of the Communist Internationale, and regularly pay party dues. (See par. 3 of the constitutions, p. 88.)

It will be observed, therefore, that stringent conditions are imposed upon the party membership which are wholly foreign to the American conception of political organization. A Communist Party member here is not simply an enrolled Communist who gives intellectual assent to its political and economic program. He must be an active worker, bound to accept and carry out promptly the orders issued to him by superior party committees, the chief of which is in a foreign country, whether he likes such orders or not.

In relation to the information disclosed by this investigation, a concurrent resolution was introduced in the House of Representatives on January 3, 1935, by the Honorable George H. Tinkham, resolving "That it is the sense of the Senate and House of Representatives of the United States that the diplomatic recognition by the Government of the United States of America of the Union of Soviet Socialist Republics should be withdrawn." This resolution has not yet been acted upon.

The action proposed in this resolution raises an interesting question as to the authority of Congress to interfere with the well-established right of the executive branch of the Government to determine, in its own discretion, the question of recognition. This aspect of the situation, however, is not involved in the present discussion, and need not be considered here.

Meanwhile, on February 6, 1935, the Department of State announced that the following changes in our representation in Moscow have been ordered:

The acting naval attaché will be withdrawn;

The air attaché will be withdrawn;

The consulate general will be abolished;

Reductions will be made in the personnel of the Embassy.

A list of agreements between Russia and foreign Governments affecting claims against Russia is embodied in the annex appended hereto.

CHANDLER P. ANDERSON

ANNEX CONTAINING LIST OF AGREEMENTS BETWEEN RUSSIA AND FOREIGN GOVERNMENTS  
AFFECTING CLAIMS AGAINST RUSSIA<sup>1</sup>

FRANCE—Notes were exchanged Oct. 28 and Oct. 29, 1924, respecting claims of French citizens. France declined Russia's proposals for settlement. Texts: *European Economic and Political Survey*, Sept. 30, 1927, pp. 43-48.

GERMANY—The Treaty of Rapallo, signed April 16, 1922, provided that both governments should renounce repayment for war expenses and damages . . . and repayment for civil damages, etc. Text: *Russian Information and Review*, May 15, 1922, Vol. 1, p. 379.

GREAT BRITAIN—

(1) Trade agreement, signed at London, March 16, 1921, contained mutual declaration of recognition of claims. Text: this JOURNAL, Vol. 16 (1922), Supplement, p. 147. General treaty, signed Aug. 8, 1924, in Chap. III, containing provisions on (Claims and loans, Arts. 6-9) was either not ratified, or was denounced on Nov. 21, 1924. Text: *Russia*, No. 4 (1924), p. 11.

(2) A protocol was signed in London, Oct. 3, 1929, relative to the procedure for regulation of matters in dispute . . . to be applied upon renewal of diplomatic relations. Sec. III related to claims and counter-claims to be settled by negotiation between the two governments. Text of protocol: *Russia*, No. 1 (1929), p. 7.

(3) The Russian Claims Department was founded in September, 1918, for the purpose of collecting and classifying the claims of British subjects against Russia or individual Russian nationals. Claims had formerly been notified to the Foreign Claims Department of the Foreign Office. The reports of the Russian Claims Department are found in the *Annual report of the Comptroller of the Clearing Office (Germany)* . . . beginning with the 3d annual report published in London, 1923. The 13th report, published in 1934, states that "Claims by British nationals continue to be registered and classified." See *Great Britain Clearing Office. Annual reports*.

No agreement for settlement of claims seems to have been concluded.

ITALY—The Treaty of Commerce and Navigation, signed at Rome, Feb. 7, 1924, contained a declaration relating to claims. See Art. 2 of the text in *L'Europe Nouvelle*, Aug. 30, 1924, p. 1152.

JAPAN—Agreement, signed at Peking, Jan. 20, 1925, for settlement of disputed questions and resumption of diplomatic relations. English text: *L'Europe Nouvelle*, special edition, Aug. 22, 1925, No. 3, pp. 56-59. Protocol (A) Art. II ("All questions relating to claims are reserved for adjustment at subsequent negotiations.")

UNITED STATES—Editorials by C. P. Anderson in this JOURNAL, Vol. 28 (1934), pp. 90 and, 545, entitled, respectively: "Recognition of Russia," and "Assignment of Claims by the Russian Government to the United States."

<sup>1</sup> NOTE.—This list was prepared in part by M. Alice Matthews, Librarian of the Carnegie Endowment for International Peace, and verified and amplified through consultation with the Department of State. It duplicates to some extent the list appended to the editorial on "Recognition of Russia," by C. P. Anderson, published in this JOURNAL, Vol. 28 (1934), at p. 97.

An examination has been made of a number of treaties between Russia and other countries in addition to those mentioned above, but no record has been found of any settlement made by Russia in respect to claims of foreign governments or nationals.

#### THE ADJUSTMENT OF THE *I'M ALONE* CASE

The auxiliary schooner *I'm Alone*, built and registered at Lunenburg, Nova Scotia, and owned by the Eugene Creaser Shipping Company Limited, a company incorporated under the laws of the Province of Nova Scotia, was sunk on the high seas by the United States Coast Guard vessel *Dexter* on March 22, 1929, more than 200 miles from the coast of the United States. The master and crew were plunged into the sea. The boatswain, one Leon Mainguy, died from drowning. The captain and the remaining members of the crew survived and were taken on board American Coast Guard vessels. They sustained losses of instruments, tools and personal effects. The cargo, consisting of intoxicating liquors, and valued at \$125,457, was lost. The destruction of the vessel was the climax of the pursuit thereof initiated by the United States Coast Guard cutter *Wolcott* on March 20, 1929, when the *I'm Alone* was within one hour's sailing distance from the coast of the United States, but outside of the territorial waters thereof. The *Dexter* joined in the pursuit on March 22. The schooner was fired upon and sunk because of the refusal of the commander to heave to.<sup>1</sup>

After her construction, the *I'm Alone* was employed for some years in rum running, the cargo being destined for illegal introduction into, and sale in,

<sup>1</sup> See "I'm Alone" Case: Diplomatic Correspondence between the Governments of the United States and Canada concerning the Sinking of the "I'm Alone," together with an Opinion of Attorney General William D. Mitchell and the Conventions of January 23 and June 6, 1924, for the Prevention of Smuggling of Intoxicating Liquors, Department of State, Arbitration Series No. 2 (1); "I'm Alone" Case: Claim made by His Majesty's Government in Canada under the Provisions of Article IV of the Convention concluded January 23, 1924, between the United States and Great Britain, *id.*, No. 2 (2); "I'm Alone" Case: Answer of the Government of the United States of America to the Claim of His Majesty's Government in Canada in Respect of the Ship "I'm Alone," *id.*, No. 2 (3); "I'm Alone" Case: Brief Submitted on Behalf of His Majesty's Government in Canada in Respect of the Ship "I'm Alone," *id.*, No. 2 (4); "I'm Alone" Case: Answering Brief of the Government of the United States of America to the Claim of His Majesty's Government in Respect of the Ship "I'm Alone," *id.*, No. 2 (5); Claim of the British Ship "I'm Alone": Statement with Regard to the Claims for Compensation Submitted by the Canadian Agent Pursuant to Directions Given by the Commissioners, Dated the 30th June, 1933, Ottawa, 1933; Claim in Respect of the Ship "I'm Alone": Statements Submitted by the Agent for the United States Pursuant to the Directions Given by the Commissioners, Dated the 30th June, 1933, Government Printing Office, Washington, 1934; Joint Final Report, Jan. 5, 1935, Department of State, Press Release, Jan. 9, 1935; Department of State, Press Release of same date, descriptive of Joint Final Report; Mr. Hull, Secretary of State, to the Minister of the Dominion of Canada, Jan. 19, 1935, Department of State, Press Release, Jan. 21, 1935. The Joint Interim Report of the Commissioners, dated June 30, 1933, and the Joint Final Report of Jan. 5, 1935, are reprinted in this JOURNAL, *infra*, pp. 326-331.

the United States. In December, 1928, and during the early months of 1929, down to the date of the sinking of the vessel, "she was engaged in carrying liquor from Belize, in British Honduras, to an agreed point or points in the Gulf of Mexico, in convenient proximity to the coast of Louisiana, where the liquor was taken from her in smaller craft, smuggled into the United States and sold there."<sup>2</sup>

In August, 1929, the United States and Canada agreed to appoint two commissioners to consider the claim of Canada in respect to the sinking of the vessel. This action was pursuant to the provisions of Article IV of the Convention concluded on January 23, 1924,<sup>3</sup> between the United States and Great Britain, providing in part that:

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

As the two Governments concerned were unable to agree upon the settlement of the matter through the diplomatic channel, the case was submitted to the consideration of Mr. Justice Willis Van Devanter, of the Supreme Court of the United States, as American Commissioner, and the Right Honorable Lyman Poore Duff, as Canadian Commissioner.<sup>4</sup> In compliance with a direction given on the 28th of January, 1932, by the Commissioners, the Agents and Counsel of the opposing States submitted briefs and oral argument in relation to three preliminary questions; and the Commissioners, on June 30, 1933, in a Joint Interim Report, gave answers to two of those questions (numbers one and three).

The first of these was whether the Commissioners might enquire into the beneficial or ultimate ownership of the *I'm Alone* or of the shares of the corporation that owned the ship. The implications of an affirmative answer were obvious; and such an answer was made by the Commissioners. Thus, in their Joint Final Report of January 5, 1935, the Commissioners declared that they found as a matter of fact that, from September, 1928, down to the date when she was sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed,

<sup>2</sup> Joint Final Report of Jan. 5, 1935, Department of State, Press Release, Jan. 9, 1935, p. 3; this JOURNAL, *infra*, p. 329.

<sup>3</sup> U. S. Treaty Series, No. 685; reprinted in this JOURNAL, Supplement, Vol. 18 (1924), p. 127.

<sup>4</sup> "The Commissioners met at Washington on January 28, 1932; at Ottawa on June 28-30, 1933; and at Washington on December 28, 1934-January 5, 1935. During the last session, oral testimony of witnesses was heard by the Commissioners and arguments were presented by the Agents of both Governments." (Department of State, Press Release, Jan. 9, 1935, p. 1.)

and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purpose of carrying intoxicating liquors from British Honduras designed for illegal introduction and sale in the territory of the United States. It was said that the possibility that one of the group of such persons might not have been of American nationality was regarded as of no importance in the circumstances of the case. Therefore, the Commissioners declared that "in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo."<sup>5</sup>

This conclusion has much significance. It bears testimony to the reasonableness of the requirement that a respondent State should not, through the agency of an arbitral or other agency or commission, be subjected to the burden of paying damages necessarily accruing to the direct benefit of its own nationals. It would have been unconscionable, under the circumstances of the case, to impose an obligation upon the United States to reimburse the American owners of the vessel and the cargo; and it would have been impossible to establish that the design of the parties to the convention of January 23, 1924, as set forth in Article IV thereof, contemplated such reimbursement.

The second question propounded to the Commissioners under their directions of January 28, 1932, related to the right of hot pursuit, and embraced, in its first aspect, the enquiry whether the Government of the United States, under the convention of January 23, 1924, "has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the pursuit and beyond that distance at its termination."<sup>6</sup> In their Joint Interim Report of June 30, 1933, the Commissioners announced that they were not then in agreement as to the proper answer and had not reached a final disagreement thereon.<sup>7</sup> In view of their ultimate response to the third question confronting them, the Commissioners seemingly found it unnecessary in their Joint Final Report to answer the second question.

The third question was based upon the assumption that the United States had the right of hot pursuit in the circumstances and was entitled to exercise the right under Article II of the convention at the time when the *Dexter* joined the *Wolcott* in the pursuit of the *I'm Alone*. The precise issue was

<sup>5</sup> Joint Final Report of Jan. 5, 1935, Department of State, Press Release, Jan. 9, 1935, p. 3; this JOURNAL, *infra*, p. 329.

<sup>6</sup> Joint Interim Report of the Commissioners of June 30, 1933, Claim of the British Ship "I'm Alone," Statement with Regard to the Claims for Compensation Submitted to the Canadian Agent Pursuant to Directions Given by the Commissioners, Dated the 30th June, 1933, Ottawa, 1933, p. 6. A second aspect of this question concerned the possession by the United States of a right of hot pursuit of a vessel when pursuit was commenced within the distance of twelve miles established by the revenue laws of the United States and was terminated beyond that distance. Inasmuch as the American Government withdrew that part of its answer which led to the propounding of this second aspect of the question, the issue called for no answer.

<sup>7</sup> *Id.*, p. 6.

"whether, in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone*." <sup>8</sup> In their Joint Interim Report of June 30, 1933, the Commissioners declared in this connection:

On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention. <sup>9</sup>

In their Joint Final Report of January 5, 1935, it was said: "By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law." <sup>10</sup> Accordingly, the Commissioners added that inasmuch as the act of sinking the ship was "an unlawful act," they considered "that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of \$25,000 to His Majesty's Canadian Government; and they recommend accordingly." <sup>11</sup>

This feature of the report has two important aspects. It points to the conclusion of the Commissioners that the United States could, and did, through the instrumentality of its Coast Guard service violate an international obligation towards His Majesty's Canadian Government, and that by necessary implication an obligation to make reparation by some process immediately sprang into being. It also concerns the rather delicate question of the character and amount of damages due to a friendly State by way of reparation for an essentially public injury sustained by it. It may be noted parenthetically that compensation was recommended for the benefit of the captain and members of the crew of the *I'm Alone*, "none of whom was a party to the illegal conspiracy to smuggle liquor into the United States and sell the same there." <sup>12</sup> The recommendation that \$25,000 be paid to His

<sup>8</sup> *Id.*, p. 7.

<sup>9</sup> *Id.*

<sup>10</sup> Joint Final Report, Jan. 5, 1935, Department of State, Press Release, Jan. 9, 1935, p. 3; this JOURNAL, *infra*, p. 329.

<sup>11</sup> *Id.*

On Jan. 19, 1935, Secretary Hull, in behalf of the Government of the United States, tendered to His Majesty's Canadian Government an apology for the sinking of the vessel and announced that he was taking steps to obtain an appropriation for the sum which the Commissioners recommended to be paid by the United States to that Government. See Department of State, Press Release, Jan. 21, 1935.

<sup>12</sup> Joint Final Report, Jan. 5, 1935, Department of State, Press Release, Jan. 9, 1935, p. 3; this JOURNAL, *infra*, p. 329. Accordingly, the sum of \$25,666.50 was recommended as com-

Majesty's Canadian Government "as a material amend in respect of the wrong" found to be chargeable to the United States deserves scrutiny. According to Article IV of the convention of January 23, 1924, it was "any claim by a British vessel for compensstion" on the grounds that it had suffered loss or injury through the improper or unreasonable exercise of rights conferred by Article II of that instrument, or on the ground that it had not been given the benefit of Article III thereof, that was to be the subject of reference to joint commissioners. The article did not appear to contemplate the reference to them of an essentially public claim. It should be observed, however, that in its discussion of the three preliminary questions, in the "Answering Brief" of the Government of the United States, of March 30, 1933, it was declared that "if the Commissioners interpret their function as that of authoritative advisers to the two Governments [which it was urged that they should], they may properly make to either Government any recommendation upon which they can agree with respect either to the further pressing of the claim or to any other phase of the controversy."<sup>13</sup> Thereafter the United States was hardly in a position to complain of the assessment of a penalty for the benefit of the Canadian Government. It should also be observed that the claim of that Government embraced an item of expenses incurred in repatriating the crew, amounting to \$6,109.41, and embracing "legal expenses" amounting to \$27,701.02, the total item being \$33,810.43. The \$25,000 recommended for payment to the Canadian Government, apart from the reasons suggested by the Commissioners, constituted partial compensation for expenses incurred by it in the prosecution of its case against the United States. For that reason, the recommendation of the Commissioners that this sum be paid to the Canadian Government may be deemed to lack importance as a precedent indicative of the propriety of the imposition by an arbitral tribunal or by a joint commission of penal damages against a respondent State in satisfaction of an essentially public claim.

It must afford satisfaction both in the United States and Canada that recourse to a joint commission in pursuance of the convention of January 23, 1924, proved to be the means of adjusting amicably an issue calculated to produce much irritation and ill-will in the Dominion. Such an instrumentality, suggested by John Jay as early as April 21, 1785,<sup>14</sup> applied successfully in the adjustment of the Alaskan Boundary Dispute in 1903,<sup>15</sup> utilized in the convention of January 11, 1909, concerning the boundary waters between the United States and Canada,<sup>16</sup> and recommended by Secretary Hughes in

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pensation for them, embracing \$10,185 as compensation for the widow and children of Leon Mainguy.

<sup>13</sup> Publications, Department of State, Arbitration Series No. 2 (5), p. 6.

<sup>14</sup> American State Papers, Foreign Relations, I, 94.

<sup>15</sup> See convention of Jan. 24, 1903, Malloy's Treaties, II, 787.

<sup>16</sup> U. S. Treaty Vol. III, 2607; this JOURNAL, Supplement, Vol. 4 (1910), p. 239.

1923 for broadest invocation as a preventive of misunderstandings between the United States and Canada,<sup>17</sup> still offers a potent means of safeguarding American-Canadian interests from unnecessary injury.

CHARLES CHENEY-HYDE

#### THE UNITED STATES SENATE AND THE WORLD COURT

For twelve years, proposals for the support of the Permanent Court of International Justice have been before the Senate and people of the United States. On February 24, 1923, President Harding requested the Senate's advice and consent for adherence by the United States to the Protocol of Signature of December 16, 1920, subject to four reservations. By a resolution of January 27, 1926, the Senate gave its advice and consent, subject to five reservations.<sup>1</sup> On September 14, 1929, a Protocol on the Accession of the United States was opened to signature at Geneva; and on December 9, 1929, the 1920 Protocol of Signature, the 1929 Protocol of Accession by the United States, and the 1929 Revision Protocol were signed on behalf of the United States.<sup>2</sup> On December 10, 1930, President Hoover requested the advice and consent of the Senate for the ratification of these protocols. No action was taken in the Senate until its Committee on Foreign Relations made a report on June 1, 1932;<sup>3</sup> but this report was never considered on the floor of the Senate. Public hearings on the matter were held by the Committee on Foreign Relations on March 23 and May 16, 1934,<sup>4</sup> and in the early months of 1934 announcement was made that it would be considered in the Senate early in the first session of the Seventy-fourth Congress.

On January 10, 1935, the Senate Committee on Foreign Relations made a report<sup>5</sup> recommending the Senate's adoption of the following resolution:

Whereas the President, under date of December 10, 1930, transmitted to the Senate a communication, accompanied by a letter from the Secretary of State dated November 18, 1929, asking the favorable advice and consent of the Senate to adherence by the United States to the protocol of date December 16, 1920, of signature of the Statute for the Permanent Court of International Justice, the protocol of revision of the Statute of the Permanent Court of International Justice of date September 14, 1929, and the protocol of accession of the United States of America to the protocol of signature of the Statute of the Permanent Court of International Justice of date September 14, 1929, all of which are set out in the said message of the President dated December 10, 1930: Therefore be it

<sup>17</sup> Charles E. Hughes, *The Pathway of Peace, Representative Addresses, 1921-1925*, New York, 1925, 3, 16.

<sup>1</sup> See the writer's analysis of the reservations, in this *JOURNAL*, Vol. 22 (1928), pp. 776-796.

<sup>2</sup> For the texts, see 1 Hudson, *World Court Reports* (1934), pp. 16, 95, 102.

<sup>3</sup> 72d Congress, 1st Session, Senate Report No. 758. See the writer's comment in this *JOURNAL*, Vol. 26 (1932), pp. 569-572.

<sup>4</sup> Records of these hearings were published at the time.

<sup>5</sup> 74th Congress, 1st Session, Senate Executive Report No. 1.

*Resolved (two-thirds of the Senators present concurring),* That the Senate advise and consent to the adherence by the United States to the said three protocols, the one of date December 16, 1920, and the other two each of date September 14, 1929 (without accepting or agreeing to the optional clause for compulsory jurisdiction), with the clear understanding of the United States that the Permanent Court of International Justice shall not, over an objection by the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

This resolution was debated in the Senate from January 14 to January 29. On January 16, 1935, in a special message<sup>6</sup> to the Senate President Roosevelt urged that "consent be given in such form as not to defeat or delay the objective of adherence."

During the course of the debate, two additions were voted to the pending resolution, the texts of both of which were borrowed from the resolution adopted by the Senate in 1926. On January 24, 1935, the Senate adopted the following addition,<sup>7</sup> proposed by Senator Vandenberg (Michigan):

*Resolved further,* That adherence to the said protocols and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said protocols and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

On January 25, 1935, the Senate refused to add to the resolution the following proposal by Senator Norris (Nebraska):<sup>8</sup>

*Resolved further,* That the adherence of the Government of the United States to said protocols and statute is upon the express condition and understanding that no dispute or question in which the United States Government is a party shall be submitted to said Permanent Court of International Justice unless such submission has been approved by the United States Senate by a two-thirds vote.

On January 29, 1935, the Senate adopted a second addition which had been printed as "intended to be proposed" by Senator Johnson (California), but which upon his declining the sponsorship was proposed by Senator Thomas (Utah):<sup>9</sup>

*Resolved further,* as a part of this act of ratification, That the United States approve the protocol and statute hereinabove mentioned with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and

<sup>6</sup> 74th Congress, 1st Session, Senate Document No. 11.

<sup>7</sup> 79 Congressional Record, pp. 425, 916.

<sup>8</sup> *Id.*, p. 989. A list of forty references to arbitration made by the President without action by the Senate, is given in *idem*, pp. 980-982.

<sup>9</sup> *Idem*, pp. 1196, 1205.

any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties in dispute.

Various reservations were proposed, some of which did not come to a vote. The usual procedure was followed, by which Senators intending and announcing that they intended to vote against the resolution in its final form voted for reservations which would make its final form objectionable to the largest number possible. Senator Nye (North Dakota) proposed that the resolution should include a reservation "that the code of law to be administered by the World Court shall not contain inequalities based on sex."<sup>10</sup> A reservation, printed as "intended to be proposed" by Senator Gore (Oklahoma), would have stipulated that the United States' action "shall not become or remain effective and shall not be or become binding while or when any nation which is an adherent of said protocols and which is indebted to the Government of the United States shall be in arrears for a period of more than six months in respect of any payment due upon such indebtedness." A reservation, printed as "intended to be proposed" by Senator Johnson (California), provided that the United States should reserve "to itself exclusively the right to decide what questions are within its domestic jurisdiction" and declared "that all questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, debts, and all other domestic questions which Congress shall have the right to define further, are wholly within the jurisdiction of the United States, and are not, under the act of adherence, to be construed as being submissible for advisory opinions, judgments, or decisions either to the Council under Article 17 of the Covenant, or to the said Court or to any agency thereof, or to the decision or recommendation of any foreign power whatsoever." Another reservation, similarly in the name of Senator Johnson, provided that the United States should assume "no obligation to be bound by an election, decision, act, report or finding of the Council or Assembly of the League of Nations," and that any national of the United States sitting as a judge might "withdraw (as provided for in Article 24 of the Statute) in any matter wherein the Court undertakes to perform any duties under the peace treaties other than the determination of suits between States or whenever the Court sustains any non-judicial relation to the League of Nations." Reservations were also proposed relating to the Monroe Doctrine.

The debate on the floor of the Senate brought out few points which have not been made over and over again during these twelve years, on one or the other side. Senator Borah (Idaho) repeated his attack on the court's advisory jurisdiction, and joined various Senators in assailing the court's opinion in 1931 on the proposed Austro-German Customs Régime. The opposition to the court was based chiefly on its connection with the League of Nations, on a fear of ratification as a step toward joining the League, on ap-

<sup>10</sup> *Idem*, p. 916.

prehension of loss of independence by the United States and of loss by the Senate of its share of control of our foreign relations. It was argued, also, that it was unnecessary for any action to be taken because the United States can now use the court, because the Permanent Court of Arbitration is available for use, and because our arbitration treaties are adequate.

As the date for a vote approached, the opposition grew in intensity, both in the Senate and over the country. The legislatures of Delaware, Nebraska and Wisconsin and the House of Representatives of the Georgia legislature adopted hostile resolutions, and a majority of the members of the Massachusetts legislature expressed their opposition.<sup>11</sup> Significant also were the persistent attacks on the court made by the Hearst newspapers, and the radio addresses of Father Coughlin of Detroit. If the vote had been taken during the week of January 20, possibly the resolution might have been carried; but a vote during the latter part of that week was prevented by the unanimous agreement of January 24.<sup>12</sup> The following week-end saw the Senate inundated by a flood of telegrams in opposition to the court, many of which were due to radio appeals. The character of much of the opposing radio campaign is perhaps indicated by the following statement of Senator Reynolds (North Carolina) in a radio address on January 27, 1935:<sup>13</sup>

The World Court is nothing but a court of babble, ballyhoo and bunk—a court of intrigue—the League of Nations is nothing but a league of notions designed to deceive and camouflage. If we affiliate with the World Court it perhaps means the ultimate cancellation of the war debts—the breaking down of our immigration barriers, and injection of Old World ideas of conquest into the New World's idea of peace.

It was in the atmosphere created by this campaign that the resolution came to a vote in the Senate on January 29, 1935. Whereas in 1926 the court resolution had been passed by 76 votes to 17, the 1935 resolution was defeated (two-thirds of the votes being required) by 52 to 36. Nineteen of the Senators who voted in 1935 had participated in the vote in 1926, and seven Senators who voted for the 1926 resolution voted against the 1935 resolution. Of the 36 votes against the 1935 resolution, ten were cast by Senators from Delaware, Montana, North Dakota, Rhode Island and South Dakota, which five States have a combined population of about 2,877,000, which is only 2.2% of the population of the United States.

<sup>11</sup> The Delaware resolution was not adopted by the two houses of the state legislature until Jan. 30, 1935; but the Georgia House of Representatives acted on Jan. 17, 1935, the two houses of the Nebraska legislature on Jan. 24 and 28, 1935, and the two houses of the Wisconsin legislature on Jan. 24 and 25, 1935. The telegrams sent by members of the Massachusetts legislature were dated Jan. 26, 28 and 29, 1935.

Senator Reynolds stated on Jan. 27 that opposing resolutions had been adopted also by the legislatures of Georgia, Illinois and Washington. 79 Congressional Record, p. 1222. The writer is unable to confirm this statement. <sup>12</sup> 79 Congressional Record, p. 917.

<sup>13</sup> The address is published in 79 Congressional Record, pp. 1221, 1222. See also his address in the Senate, in similar strain, on Jan. 24. *Id.*, p. 909.

A minority of the Senate thus frustrated the adoption of a measure supported by Presidents Harding, Coolidge, Hoover, and Roosevelt; by Secretaries of State Hughes, Kellogg, Stimson and Hull; and by the three leading political parties in their 1932 platforms. This measure had also been approved, in the words of Attorney General Cummings,<sup>14</sup> "wherever and whenever associations of members of the bar have had occasion to give expression to their opinions" over a period of thirteen years.

Why has the Senate thus receded from the position which it took in 1926?

The explanation is not to be found in arguments on the merits of the court itself. In some quarters there was opposition to a court mainly composed "of foreign judges," whose names some Senators could not pronounce,<sup>15</sup> and "only two of whom understand English," a court which has no code of law to apply. In some quarters, also, the advisory function of the court was attacked as a non-judicial function, with little regard for the rôle which advisory opinions have played and still play in Anglo-American jurisprudence. In some quarters, opposition was based upon the court's connection with the League of Nations, in almost complete disregard of the facts that in these twelve years the United States has found it impossible to refrain from extensive coöperation at Geneva, that the United States has recently become a member of the International Labor Organization, and that a considerable part of the American public would even favor membership in the League of Nations.<sup>16</sup> Some Senators wished to tie the hands of the President so that he could not agree to a reference to the court without the Senate's consent; Senator Norris (Nebraska) wished to tie the hands of the Senate so that it could not consent to a general treaty providing for references to the court.

The explanation of the Senate's shift is to be sought in events which are not related, or are not closely related, to the court. Chief of these is the default by various European governments in the payment of their debts to the United States. It is idle to argue this question with American taxpayers who are feeling the burden of taxes in this period of depression; and any sympathetic consideration of arguments which may be advanced by defaulting governments is precluded by the fact that many of these same governments are maintaining large armed forces which the Disarmament Conference has failed to reduce. Moreover, the defaults have intensified a feeling in some quarters that the United States was used as a cat's paw in the World War. In consequence, coöperation by the United States with European governments in the maintenance of international institutions is rendered more difficult. During the Senate debate, one Senator expressed a feeling

<sup>14</sup> In a brochure entitled *In re the World Court*, published by the American Bar Association (1934).

<sup>15</sup> 79 Congressional Record, pp. 910, 1203, 1204.

<sup>16</sup> As indicated by a vote on a "question of public policy" in 36 representative districts in Massachusetts, on Nov. 6, 1934, in which 62.3% of the votes cast were favorable to United States membership in the League. See the writer's account in *New York Times*, Nov. 25, 1934.

which was probably shared by others when he exclaimed, "To hell with Europe."<sup>17</sup> The defeat of the court resolution gave satisfaction in some quarters as a slap back at Europe.

It must also be noted that in the course of twelve years the statement of the action proposed to be taken by the United States has become cumbersome and complicated, with the result that many people in the United States have found difficulty in understanding or explaining it. This was expressed in a preamble to the resolution adopted by the Wisconsin Legislature on January 25, 1935, as follows:

Whereas the whole League-Court controversy is so involved with reservations, amendments, conditions, and protocols that the average citizen is completely muddled as to just how far the internationalists now hope to commit this country; and that no qualification can be so drawn as to retain complete freedom of action, and accordingly the wisest thing is to keep clear of European political jealousies and entanglements altogether.

In 1923, Secretary Hughes proposed four reservations, two of which were wholly unnecessary and served no practical purpose. The Senate resolution adopted in 1926 contained five reservations which could have been greatly simplified; they included a reservation on advisory opinions which Secretary Hughes had not thought to be necessary and the wisdom of which many people have been disposed to question. The 1929 Accession Protocol added new provisions which have not been uniformly interpreted; on the basis of the Senate's fifth reservation it erected a superstructure which some people have persisted in refusing to comprehend. The resolution voted on by the Senate in 1935 contained three further "understandings." The whole pyramid of conditions, reservations and understandings has confused many minds, and the confusion was reflected in the Senate debate.<sup>18</sup> Somehow, the issue ought to be simplified, and perhaps at some future time a statement of the action to be taken by the United States can be made anew.

In some quarters, the Senate's vote has led to a renewed insistence on an amendment to the Constitution of the United States, abolishing the requirement of a two-thirds vote in the Senate when it advises and consents to treaties. Little prospect of success would now be open to a movement to that end. For some time attention has been given to the possibility of support of the court by the United States in consequence of action by the two Houses of Congress by majority vote. On May 2, 1932, a resolution was introduced in the House of Representatives by Mr. Linthicum (Maryland), which would have authorized an appropriation to enable the United States to pay a share of the court's expenses.<sup>19</sup> On January 24, 1935, Mr. David J.

<sup>17</sup> The exclamation was excised from the printed record.

<sup>18</sup> See the remarks by Senator Bulow (South Dakota), Jan. 29, 1935. 79 Congressional Record, p. 1215.

<sup>19</sup> 72d Congress, 1st Session, H. J. Res. 378. A favorable report on this resolution was

Lewis (Maryland) introduced in the House of Representatives a bill providing for authority to be given by Congress for the President's ratification of the three Court Protocols including the "optional clause";<sup>20</sup> if the authority recently given to the President to accept an invitation to the United States to become a member of the International Labor Organization<sup>21</sup> would serve as a legal precedent for such action, the proposal presents a question of political expediency rather than of legal power.

In no country other than the United States has an issue been made of supporting the existing court. It is being maintained at the present time (April 1, 1935) by the 49 parties to the 1920 Protocol of Signature, and by twelve additional States which as members of the League of Nations contribute to meeting its expenses. The court's annual reports list 475 international instruments which relate in some way to its jurisdiction, and 41 States or members of the League are now bound by the "optional clause" which gives the court jurisdiction over certain classes of disputes. The "permanence" of the court seems assured. It is now engaged in holding its 34th session, having before it a request for an advisory opinion relating to minority schools in Albania. Clearly, the vote in the United States Senate will not undo the great progress achieved in the establishment of the court and in its successful functioning over a period of more than thirteen years. It seems inevitable that the United States will yet find a way of sharing the responsibility for the contributions which the court will continue to make.

MANLEY O. HUDSON

#### TREATIES AND CHANGING CONDITIONS

It would seem self-evident that it is better to revise or to put an end to a treaty in accordance with law rather than to risk friction on account of breaking a treaty. Yet straining the treaty to the breaking-point or breaking the treaty itself has been common in international readjustments in recent years. The doctrine of *rebus sic stantibus* has been advanced as a basis of setting aside treaty obligations. Some liberal constructionists of this doctrine find even in slight changes of conditions in one of the states parties to the treaty, or even in neighboring states, sufficient ground for considering inoperative the whole or certain provisions of a treaty. Those following a stricter doctrine maintain that the only ground upon which the treaty may be set aside is such a change in conditions as makes the action acceptable to all parties to

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made by the House of Representatives Committee on Foreign Affairs on June 15, 1932. 72d Congress, 1st Session, House of Representatives Report No. 1628. See also the writer's comment in this JOURNAL, Vol. 26 (1932), pp. 794-796.

<sup>20</sup> 74th Congress, 1st Session, H. R. 4668. See also the letter of Professor James W. Garner, of the University of Illinois, in the New York Times of Feb. 10, 1935.

<sup>21</sup> The Constitution of the International Labor Organization was proclaimed by the President on Sept. 10, 1934, and is published in U. S. Treaty Series, No. 874. On the effect of this action, see the writer's comment in this JOURNAL, Vol. 28 (1934), pp. 669-684.

the treaty. In the days when most treaties were between two states such a waiver of the terms was sometimes possible, but as many states may be and now frequently are parties to a treaty, agreement of all parties is less probable.

Treaties containing clauses providing that the agreement shall be in perpetuity, or treaties omitting provisions for revision or for termination, have often been the cause of international friction. There has been a growing appreciation of the advantage of advance recognition that at a specified period after the treaty is in effect conditions may have changed to an extent which would warrant modification of the treaty. When the articles have already been carried out, as in executed boundary treaties or treaties for the payment of money, there may be no reason for further provisions, but in many executory treaties changing conditions may make modifications essential.

States are now taking cognizance of the possibility that conditions in the future may make changes in treaties desirable and that this should be provided for in advance rather than that the relations between them should become unduly strained. Japan in giving notice of intention to terminate the Washington Treaty on Limitation of Naval Armament on December 31, 1936, was acting in accord with Article 23 of the treaty.

In many treaties it may be advisable to make provisions not merely for denunciation but also for changes from time to time as conditions seem to demand. This practice is meeting with favor as is seen in some recent treaties of the United States where clauses similar to the following occur:

Article XXXII. The present Treaty shall be ratified and the ratifications thereof shall be exchanged at Washington. The Treaty shall take effect in all its provisions thirty days from the date of the exchange of ratifications and shall remain in full force for the term of one year thereafter.

If within six months before the expiration of the aforesaid period of one year neither High Contracting Party notifies to the other an intention of modifying by change or omission, any of the provisions of any of the Articles in this Treaty or of terminating it upon the expiration of the aforesaid period, the Treaty shall remain in full force and effect indefinitely after the aforesaid period subject always to termination on a notice of six months.<sup>1</sup>

The more frequent resort to such clauses would make disputes under the doctrine of *rebus sic stantibus* less probable as the adaptation of treaties to changing conditions under these clauses becomes a regularized procedure.

GEORGE GRAFTON WILSON

<sup>1</sup>Treaty between the United States and Finland, proclaimed August 10, 1934, Treaty Series No. 868.

## THE DOCTRINE OF THE THALWEG AS A RULE OF INTERNATIONAL LAW

In the recent case of *New Jersey v. Delaware*<sup>1</sup> the United States Supreme Court reaffirmed its holdings in various earlier cases that when a navigable river separates two States of the American Union, the boundary line between them follows the *thalweg* or center of the navigable channel, in the absence of special arrangements to the contrary or unless a different line is established as a result of the operation of prescription. This solution, the court added, is now an established rule of international law which governs the location of the boundary line in navigable rivers separating independent States. In this case the question at issue was as to the location of the boundary line at two different places in the Delaware River: first, its location in that part of the river within a twelve-mile circle about the town of New Castle in Delaware; second, its position within the river and bay below this circle. The matter had been a source of dispute between the two States almost from the establishment of the Union, but since the claims of neither party had ever been acquiesced in by the other, neither had acquired any title by prescription. On the basis of various early deeds and grants, Delaware claimed to be the owner of the entire bed of the river within the circle to the low water mark on the New Jersey side, whereas New Jersey claimed to the middle of the channel. On this point the court upheld the contention of Delaware. No principle of international law was involved in reaching a decision as to the position of the boundary line here, the matter being determined wholly by the municipal acts referred to above.

Concerning the location of the boundary line in that part of the river and bay below the circle, New Jersey claimed that the line followed the *thalweg*, while Delaware contended that it followed a line which should be drawn midway between the opposite banks or shores. Delaware did not deny the validity of the *thalweg* doctrine, provided the physical conditions of the river were such that there was a clearly defined *thalweg* or track of navigation, but she contended that within the bay, at least, there was no particular navigable channel, all parts being equally navigable. The boundary should in such circumstances follow a line drawn through the geographical center of the bay equidistant from the opposite shores. As to the section of the river between the bay and the circle where it was not denied that a well-defined track of navigation existed, the line should likewise be drawn on the same principle as a matter of convenience, since otherwise the boundary would suffer a sharp and sudden turn at the place where the river meets the bay. Relying upon the findings of the special master in the case that the contention of Delaware as to the lack of a well-defined navigable channel in the bay was not in accord with the facts and emphasizing considerations of equality and justice, the court rejected the contention of Delaware and upheld the claim of New Jersey that below the circle referred to above the

<sup>1</sup> (1934) 291 U. S. 361.

line should follow the main channel of navigation, which the court found to have a well-defined existence both in the river and in the bay. The court admitted that there was force in Delaware's argument based on inconvenience, but it pointed out that the inconvenience would be greater if the *thalweg* were not followed consistently through the river and the bay alike, because it would result in a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. On the contrary, if the line were located in the *thalweg*, it would "follow the course furrowed by the vessels of the world."

In a learned opinion Mr. Justice Cardozo reviewed the doctrine and the jurisprudence concerning the location of boundary lines in navigable rivers, and concluded that "international law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks." He added: "The underlying rationale of the doctrine of the *thalweg* is one of equality and justice. 'A river,' in the words of Holmes, J. (*New Jersey v. New York*, 283 U. S. 342) 'is more than an amenity, it is a treasure.' If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel the whole track of navigation might be thrown within the territory of one state to the exclusion of the other." Adverting to the development of the *thalweg* rule from an age when it lacked precision and fixity, he declared that there "has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. Unless prescription or convention has intrenched another rule, we are to utilize the formula that will make equality prevail." It was, he thought, the application of this formula which equality, justice and convenience required in the present case. It is not easy to see how the soundness of his reasoning could be successfully challenged.

JAMES W. GARNER

#### THE "GOLD CLAUSE" DECISION IN RELATION TO FOREIGN BONDHOLDERS

The decision of the Supreme Court of the United States in *Perry v. United States*, handed down on February 18, 1935, raises several interesting problems in international law. The issue before the court was the constitutionality of a joint resolution of Congress, adopted June 5, 1933, in accordance with which every provision contained in a contractual obligation which purported to give to the holder of the obligation a right to require payment in gold or in a particular kind of coin or currency was declared to be "against public policy," and such provisions were forbidden in future contracts. Further, every obligation, past or future, whether containing such a provision or not, should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public and

private debts. The term "obligation" was defined to include both obligations *of* and *to* the United States, excepting currency.

The Supreme Court, after having decided at the instance of another plaintiff that the law was constitutional with respect to private contracts between citizen and citizen, took the position in Perry's case that it was beyond the power of Congress by legislative fiat to set aside the obligations of the United States to the holders of government bonds calling for payment in gold. In making payment in legal tender instead of gold, the court held, the United States was guilty of breach of contract with Perry and was due to pay damages for the breach. Inasmuch, however, as the plaintiff, in view of the purchasing power of the legal tender that had been paid to him in place of gold, could not show damage to the extent claimed, or any actual damage, his suit before the Court of Claims must necessarily fail, since that court had no jurisdiction to entertain an action for nominal damages.

What is the inference to be drawn with respect to foreign bondholders who might bring their claims before the Court of Claims in reliance upon their ability to show damages in their case? Confessedly there has been breach of contract. We may put aside for the moment the question whether a foreign government which took up the claim of its citizen might not present a case in equity for specific performance, since the same considerations which would support an equitable claim would appear to indicate a claim for damages in a suit at law. Proceeding then upon the ground that damages are due, how are such damages to be determined? In the case of the plaintiff Perry the court held that his damages could not be assessed "without regard to the internal economy of the country at the time the alleged breach occurred." The demand of Perry for the "equivalent" in currency of the gold coin called for by the contract could not mean more than "the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used," having in view the control of export and foreign exchange and the restricted domestic use. In the case of the foreign bondholder none of these legal restrictions upon the use of gold apply. The provisions of his own local law do not enter into the question. Hence his damages should be measured upon a different basis from that applied to the domestic bondholder.

Two standards appear to be applicable as a measure of the damages due to the foreign bondholder. The first would be based upon the conception of the gold clause as a device for insuring that money borrowed shall be paid back in money as good as that loaned. Taking money as a medium of exchange, having value by reason of its purchasing power of a given quantity of goods, to pay back money "as good as that borrowed" would call for the determination of the purchasing power of dollars at the time the foreign bondholder bought his bond. Supposing the bonds to have been paid off in 1933, what was the relation between the purchasing power in Great Britain or France of dollars paid for a bond acquired, for example, in 1923 and

the purchasing power of the same number of dollars in 1933? The difference, if any, would be the amount due by the United States in damages. By this standard the United States would, of course, be entitled to pay in legal tender fewer as well as more than the number of dollars called for by the bond in case the purchasing power of the dollar had increased rather than fallen in terms of the domestic market of the foreign bondholder. In principle, there would seem to be no reason why the foreign bondholder should profit by the advance in the value of gold due to the demoralization of his own national currency. For if that were the case it might be argued that the United States had an equal right to depreciate its own currency; and the foreign bondholder, having bought his bond in the open market, must take his chances of devaluation along with citizens, provided only that the legal tender given him in place of gold had not lost its old purchasing power.

Stated thus even in its simplest terms, this first standard of determining damages is seen to be so difficult of application as to be ruled out from the start. The problem of determining the relative purchasing power of dollars in terms of the market open to the foreign bondholder would be practically impossible of solution. The restrictions put upon the use of gold in the United States, which, in the eyes of the court, were a consideration in determining the damages due to a citizen bondholder, not being applicable to the foreigner, could not be taken to account; while the possible restrictions in the particular foreign country would seem not to be a proper subject of inquiry by the United States. The assumption would have to be that the foreign bondholder could use the gold called for by his bond for any and every purpose for which it had been customary to use it.

The second standard of measuring the damages due to the foreign bondholder would be the difference between the value of the present legal tender dollar in terms of the national currency of the foreign bondholder and the value of dollars of the former gold content, in other words, the paper money equivalent of the gold clause obligation. Payment of the increased number of depreciated dollars as damages for the breach of contract would, of course, be practically the same as recognizing the obligation of specific performance of the contract; for the gold itself is not the object sought by the foreign bondholder but merely its equivalent in legal tender. In *Feist v. Société Intercommunale Belge d'Électricité* (1934), A. C. 161,<sup>1</sup> the British House of Lords, overruling the Chancery Division and the Court of Appeal, held that the gold clause in the contract between the Belgian company and the bondholder was not to be construed as constituting the mode of payment, now forbidden by law, but as describing and measuring the company's obligation which could and should be met in such a sum in sterling as represented the gold value of the nominal amount due on the bond. In reaching this conclusion the court relied upon the decision of the Permanent Court of International Justice in the Serbian Loans case, where it was held that "the treat-

<sup>1</sup> Reprinted in this JOURNAL, Vol. 28 (1934), p. 374.

ment of the gold clause [in the contention of the Serbian government] as indicating a mere modality of payment, without reference to a gold standard of value, would not be to construe but to destroy it."

Can the obligation of the United States upon its gold bonds be offset in particular cases by considerations arising from the unpaid obligations of certain foreign governments to the United States, or from the fact that the resolution of June 5, 1933, makes to foreign governments the extremely valuable concession of being able to pay their debts to the United States in depreciated gold dollars, or from the fact that large numbers of American holders of foreign bonds have suffered by reason of the circumstance that payment on their bonds was not specified to be in gold and was made in depreciated currency? All three considerations bear upon the extent to which obligations due by a state to an alien individual may be validly set aside by identifying the alien with his government and meeting his claim by entering a counterclaim based upon the debts or torts of his government. Such an identification, it is submitted, would be so contrary to the established principles of international law that it must be rejected upon its mere suggestion. Even the most extreme nationalist must hesitate before asserting a doctrine that would have such far-reaching implications. As a practical proposition, the attempt to identify the individual with his government would put an end forthwith to all foreign purchases of government bonds and indeed to all contracts between citizens of one state and the government of another. It would be bad law and worse economics, whatever claims might be made for it in the realm of abstract equity.

In its last analysis the gold clause in government bonds of the United States held by foreigners is an obligation of good faith. However equitable and just it may be that the United States should ask of its citizen bondholders that they subordinate technical rights to the good of their country as a whole as determined by the judgment of the elected legislative body, the same reasoning does not apply to the foreign bondholder. He bought his bond in reliance upon the good faith of the United States, and the maintenance of that good faith is imperative. It is not merely a question of preserving the credit of the United States as a borrower; it is a matter of national morals higher than mere practical considerations. The sole plea in abatement that might be made to the obligation would be the hard fact that the United States did not have the gold (and therefore did not have its equivalent in legal tender) with which to make the payment called for by the bond. This plea, however, is, under the actual circumstances, simply inadmissible. The gold is here and could be transferred without in any way disrupting the national economy. In fact most economists are agreed that the transfer of the gold would not only not disrupt domestic finances but would actually stimulate foreign trade. Apparently in this case the copybook maxim of honesty being the best policy is more than a pious instruction for children.

C. G. FENWICK

## CRAMPING OUR FOREIGN SERVICE

At this time when every effort is being made to extend our commerce and the cordiality of our relations with our neighbors, it is strange indeed that the number of our Foreign Service officers—instruments of this important work—has been greatly curtailed, and this seems all the more extraordinary when we find that the fees received for services abroad for the fiscal year ending June 30, 1934, showed an increase of 11.3% over the preceding year, amounting to \$218,739.19. Since 1932 there has been a reduction of 47 consular offices, or 12%, and a reduction of 72, or 9.7%, in the number of Foreign Service officers. To this should be added a reduction in the clerical staff at foreign missions and consulates of 421 clerks, that is 20% of the whole number.

When we consider the volume and the importance of the work performed, it is remarkable that 38 out of our 54 missions have three or less clerks; eleven have four to six clerks and only five have seven or more. Of the 271 consular offices, 133 have three clerks or less; 77 have four to six clerks; 28 have seven to nine and 33 have ten or more. It is through this comparatively small personnel that fees amounting to over two million dollars annually are collected. Since the commencement of the period of curtailment no promotions of the five upper classes of Foreign Service officers have been made. This is not only an injustice to those men who have had long careers of faithful service, but it leaves the Service without the higher commands necessary for the most efficient handling of our complicated international relations. We need a sufficient number of generals to command the privates. At the other end of the line we find a stoppage no less unfortunate, for there are now some 43 names on the eligible list of those who have passed the examination and are waiting for appointment; yet no appointments have been made since early in 1932, and it is only thanks to a recent Presidential order<sup>1</sup> that these candidates have been continued on the eligible list for another year and a half. Without this executive order those who had failed to receive an appointment would have been automatically dropped from the list and required to take another examination before they could have been appointed. In addition, several hundred applicants are eagerly waiting to take the Foreign Service examinations, which have been omitted for over two years, that is, since September 26, 1932.

Notwithstanding the far-reaching reforms recently introduced in our Foreign Service, it is still true that a majority of those who receive appointments as minister or ambassador are non-career men. This is an American peculiarity and remnant of the spoils system. It is true that the Linthicum Act provides: "The Secretary of State is directed to report from time to time to the President along with his recommendations the names of those foreign service officers who by reason of efficient service have demonstrated special capacity for promotion to the grade of minister. . . ."<sup>2</sup>

<sup>1</sup> Executive Order No. 6950 dated Jan. 23, 1935.

<sup>2</sup> Sec. 14 of the Act approved Feb. 23, 1931.

The President is, of course, free to nominate whom he will, and when he believes that someone outside of the service will prove a better choice, he should pass over the names of the career men on the submitted list. He must, however, realize how important it is for the morale and efficiency of the whole Foreign Service that every officer in it entertain a reasonable expectancy that especially meritorious service will be rewarded by ultimate promotion to a Chief of Mission.

An examination of the record since July 1, 1924, when the Rogers Act went into effect, discloses that the proportion of career officers appointed as Chief of Mission was greatest on July 1, 1930, when 27 out of 52 were career officers — approximately 52%. Of the fifteen ambassadors serving at that time, we find seven were career men.<sup>3</sup>

On January 1 of this year the ratio of career appointments was 23 out of 49—approximately 47%. With sixteen ambassadors—one more than in 1930—there were six or one less career officers. Appointments still fall far too frequently from the patronage tree as plums for “deserving” political henchmen. The service has a real need for more career ministers and ambassadors, and it should also become the recognized practice to retain in active service those who attain the high rank of Chief of Mission until they reach the age of retirement. As it is now, an appointment as Minister or Ambassador may mean that the officer is made to walk the plank when a succeeding administration covets his position to placate a political protégé.

At present the lack of adequate representation allowances often makes it impracticable to promote an officer of the highest efficiency to certain ambassadorial posts, but political commitments or exigencies more frequently prove the obstacle. As a well-informed critic truly observes: “Men may still

<sup>3</sup> CHIEFS OF MISSIONS IN THE AMERICAN FOREIGN SERVICE

As of	Political Appointees			Career Appointees			Total Political and Career
	Ambas- sadors	Minis- ters	Total	Ambas- sadors	Minis- ters	Total	
July 1, 1924.....	8	22	30	4	13	17	47
July 1, 1925.....	9	20	29	4	15	19	48
July 1, 1926.....	9	20	29	4	15	19	48
July 1, 1927.....	9	18	27	5	16	21	48
July 1, 1928.....	9	18	27	5	18	23	50
July 1, 1929.....	8	17	25	4	20	24	49
July 1, 1930.....	8	17	25	7	20	27	52
July 1, 1931.....	8	18	26	7	19	26	52
July 1, 1932.....	7	18	25	7	19	26	51
July 1, 1933.....	9	17	26	6	19	25	51
July 1, 1934.....	10	16	26	6	19	25	51
Jan. 1, 1935.....	10	16	26	6	17	23	49

be named as ambassadors on the basis of somewhat indefinite personal qualifications and very definite campaign contributions."<sup>4</sup>

Another injustice to the officers in the Foreign Service results from the unequal treatment which they receive in comparison with the foreign agents of other departments or agencies of the Government. For instance, Foreign Service officers have been unable to return home for their vacations and have been held several years abroad because no funds were available to pay their travel expenses, whereas other American officials abroad have had their expenses paid so that they could return to this country for a vacation. It needs no argument to show that such discrimination is disastrous to the morale of the Foreign Service. Certain Foreign Service officers were temporarily subjected to a treatment still more unfortunate. They were encouraged in the interest of efficiency to take quarters more appropriate to their mission, and relied upon the continuation of appropriations for additional rent allowance. In consequence, a number of them signed long leases, when to their discomfiture the appropriation was suddenly cut out and they were left to settle as best they could the leases which they were obliged to cancel. They were at this same time further embarrassed because their salaries had been reduced by the 15% applied to all government officials.

There are in the Foreign Service two women and 685 men, two of whom are Negroes. Many university teachers find that women students are eager to enter the Foreign Service, but the experience of those women who have been successful in securing an appointment makes one doubt whether they would find the service as attractive as they suppose. Of the six women who were successful in passing the examination and receiving an appointment as Foreign Service officer, three soon resigned to marry and a fourth resigned to go into business but married shortly after. The longest period of service of these four was five years, and the average length of service for all women appointed is less than four years. In no case has any woman as yet seen as much as eight years' service. The principal jeopardy to the Foreign Service career of these young women is not surprisingly found to be marriage. It is no wonder that young women attractive and gifted enough to secure the coveted appointment are sought in marriage. In view of the experience of these women Foreign Service officers, any young woman who desires to enter the Foreign Service should consider very carefully whether she is not likely to be disappointed even should she overcome the tremendous competition and secure the coveted appointment. Few attractive young women would like to rule out the thought of possible marriage, but when they do marry, under the present social conditions they can hardly expect their husbands to follow them about the world as they change from post to post.

After ten years we find that this country has a unified Foreign Service, which was the central idea of the Rogers Act of 1924. Every diplomat who

<sup>4</sup> Henry Kittridge Norton, "Foreign Service Organization," Supplement to Vol. CXLIII of the *Annals of the American Academy of Political and Social Science*, May, 1929, p. 40.

has entered the service since that date has had consular experience, and recently a number of diplomatic secretaries were appointed Consuls General. In fact, at the present time there are not more than forty Foreign Service officers serving at diplomatic posts who have not had experience in the consular branch. This is very important for two reasons: first, because it has helped to put an end to the jealousies and rivalries which used to exist between the two branches of the service; and, second, because it lays emphasis upon the importance of training in the fields of economics, finance and commerce. The day of the old social type of diplomat is passing, to give place to officers who are familiar with commercial and other data upon which international intercourse is based.

It is a satisfaction to note that our Foreign Service has greatly benefited in those countries where we have constructed buildings for embassies, legations, and consulates. It was made possible to do this in an effective manner through an appropriation of ten million dollars, in a revolving fund which did not expire, as is usually the case, at the end of the fiscal year or session, but was made available year after year until the whole fund was exhausted.<sup>5</sup> Unfortunately, that is now the case and it is hoped that Congress will not long delay in making another appropriation for the same purpose, and thus enable the Foreign Service Building Commission to purchase at a reasonable figure sites for other establishments abroad and to make all the necessary arrangements for their construction and furnishing.

Thanks to the efforts of successive Presidents and Secretaries of State, aided by Congressmen Rogers, Porter, Linthicum, and others, we have a Foreign Service second to none in the world. It should receive the grateful and sustained support of public opinion, instead of remaining any longer the stepchild of our Government.

ELLERY C. STOWELL

<sup>5</sup> Foreign Service Buildings Act, approved May 7, 1926.

## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 15, 1934—FEBRUARY 15, 1935

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *Geneva*, A Monthly Review of International Affairs; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department.

#### January, 1934

- 18 FRANCE—GREAT BRITAIN. Signed convention concerning reciprocal enforcement of judgments in civil and commercial matters. *France*, No. 2 (1934), *Cmd.* 4717.

#### June, 1934

- 21 IRISH FREE STATE—SPAIN. Exchanged notes regarding commercial relations. *G. B. Treaty Series*, No. 36 (1934).

#### August, 1934

- 17 DENMARK—GREECE. Exchanged ratifications of treaty of conciliation, arbitration and judicial settlement signed at Athens April 13, 1933. *T. I. B.*, Nov., 1934, p. 1.

#### September, 1934

- 4 GREAT BRITAIN—THE YEMEN. Exchanged ratifications of treaty of friendship and mutual coöperation signed at San'a Feb. 11, 1934. *G. B. Treaty Series*, No. 34 (1934), *Cmd.* 4752.

- 10 to Feb. 14, 1935 EASTERN EUROPEAN (LOCARNO) PACT. On Sept. 10, Germany formally rejected the plan for an "Eastern Locarno" pact. The pact was presented to Germany by Great Britain, backed by France and Russia. Summary of reasons for rejection: *N. Y. Times*, Sept. 11, 1934, p. 14; *Times* (London), Sept. 12, 1934, p. 13. French reply of Jan. 16 to German note. *N. Y. Times*, Jan. 17, 1935, p. 15. On Feb. 2, France and Great Britain agreed to grant arms equality to Germany and abolish arms restrictions provisions of Treaty of Versailles, if Germany would consent to return to League of Nations and Disarmament Conference at Geneva. Air security pact proposed. Summary: *N. Y. Times*, Feb. 3, 1935, p. 1. Text of official statement: *Times* (London), Feb. 4, 1935, p. 12. German Government's reply to Anglo-French communique of Feb. 3, delivered orally by the Foreign Minister on Feb. 14, stated that Germany is willing to participate in Western Europe air convention but bars Eastern Locarno. Text: *N. Y. Times*, Feb. 16, 1935, p. 4; *Times* (London), Feb. 15, 1935, p. 14.

- 11/17 GREAT BRITAIN—UNITED STATES. Exchanged notes for reciprocal validation of certificates of airworthiness. *G. B. Treaty Series*, No. 38 (1934).

13/18 GERMANY—GREAT BRITAIN. Exchanged notes for reciprocal validation of certificates of airworthiness. *G. B. Treaty Series*, No. 37 (1934).

26/29 AERIAL LEGAL EXPERTS. International technical committee of aërial legal experts held 9th session in Berlin, with 15 countries represented, including the U. S. *T. I. B.*, Nov., 1934, p. 9; *Amer. Bar Assoc. Journal*, Dec., 1934, p. 752.

#### October, 1934

5 BARKS—PAKRAC RAILWAY CO., LTD. Award rendered by arbitrators appointed under resolution of League of Nations Council of Jan. 17, 1934. Text: *L. N. O. J.*, Dec., 1934, p. 1679.

5 POLAND—UNITED STATES. Agreement for mutual recognition of ship measurement certificates effected by exchange of notes signed January, March, April, 1930, and Oct. 5, 1934. *Ex. Agr. Ser.*, No. 71.

6 MEMEL DISPUTE. British Foreign Office announced that report of jurists on complaint of Germany against measures taken by Lithuanian Governor of Memel Territory was being considered by the Foreign Office, France, and Italy, which are with Japan, special guarantors of the Memel Statute. *Times* (London), Oct. 6, 1934, p. 11. On Dec. 14, the trial began before a Lithuanian court-martial, of 126 persons accused of conspiring to seize for Germany the Memel area under Lithuanian protection. *Times* (London), Dec. 15, 1934, p. 11; *Cur. Hist.*, Feb.—March, 1935, pp. 628 and 755.

15-25 INSTITUTE OF INTERNATIONAL LAW. 39th session, originally scheduled for Madrid, was held in Paris, for discussion of an international office of maritime waters, international rivers and bodies of water, reprisals in time of peace, and recognition of new states. Resolutions: *Revue de droit international* (Brussels), 1934, ser. 3, v. 15: 743; *Revista de derecho internacional* (Habana), Dec., 1934, p. 280.

18 CLEARING AGREEMENTS. Mixed committee of members of Economic and Financial committees of the League of Nations held first meeting in Paris to deal with compensation and clearing agreements in 25 countries. *L. N. M. S.*, Oct., 1934, p. 245; *Times* (London), Oct., 1934, p. 245.

25 TURKEY—UNITED STATES. Signed final agreement at Istanbul for settlement of claims of nationals of each country against the other, embraced within the agreement arranged by exchange of notes of Dec. 24, 1923, and Feb. 17, 1927. Text: *Press Releases*, Dec. 22, 1934, p. 413; *T. I. B.*, Dec., 1934, p. 24.

#### November, 1934

18 HUNGARY—ITALY. Signed trade convention for developing traffic through Fiume. *B. I. N.*, Jan. 24, 1935, p. 21.

20 DISARMAMENT CONFERENCE. The Bureau convened to consider three questions: (a) control of manufacture of and trade in arms; (b) budgetary publicity; (c) setting up of a Permanent Disarmament Commission. The United States representative submitted draft treaty for international control of private or state manufacture and export or import of arms. *L. N. M. S.*, Nov., 1934, p. 262. Text of draft proposal of U. S.: *N. Y. Times*, Nov. 21, 1934, p. 2; *Press Releases*, Dec. 22, 1934, p. 391.

20 to Jan. 16, 1935 CHACO DISPUTE BETWEEN BOLIVIA AND PARAGUAY. The Assembly of the League, convened in special session for the purpose of considering the dispute, met on Nov. 20, and on Nov. 24 adopted plan for settlement: Text: *L. N. M. S.*, Nov., 1934 and Annex. On Dec. 12, 20 and 21, the Advisory Committee, set up by the Assembly on Nov. 24, met at Geneva to consider Bolivia's acceptance and

- Paraguay's observations on recommendations of Assembly report. *L. N. M. S.*, Dec., 1934, p. 283. On Dec. 17, diplomatic conversations were opened in Buenos Aires by Argentina, Brazil, Chile and the United States regarding peace measures. *N. Y. Times*, Dec. 13, 1934, p. 32. On Jan. 16, the Advisory Committee of the League recommended ending arms embargo to Bolivia and strengthening it as applying to Paraguay. *N. Y. Times*, Jan. 17, 1935, p. 1; *L. N. M. S.*, Jan., 1935, p. 9.
- 20-28 WHEAT CONFERENCE. International Wheat Advisory Committee held 6th session in Budapest. Argentina rejected 1933 wheat pact as basis for new quota allotments. No agreements reached. Next session set for March 5, 1935. *N. Y. Times*, Nov. 2 and Dec. 2, 1934, pp. 13 and 26.
- 21 AUSTRALIA-BELGIUM. Signed provisional agreement in settlement of recent trade dispute. *Times* (London), Nov. 22, 1934, p. 13.
- 21 PORTUGAL-SOUTH AFRICA. New Mozambique Convention, signed at Lourenco Marquez on Nov. 17, made public. It provides that South African railways might alter tariffs as required and removed some features in previous convention to which South Africa had objected. *E. I. N.*, Dec. 6, 1934, p. 33.
- 22 to Dec. 10 HUNGARY-YUGOSLAVIA. On Nov. 22, Yugoslavia placed before League of Nations Council certain aspects of the Marseilles outrage of Oct. 9, which caused the deaths of King Alexander of Yugoslavia and M. Barthou, French Foreign Minister, asking that matter be considered at its next session. Rumania and Czechoslovakia associated themselves with the Yugoslav request. *Times* (London), Nov. 23, 1934, p. 13. On Nov. 28, in a detailed memorandum Yugoslavia supplied documents in support of allegations of terrorist activity on Hungarian soil. (*L. N. Doc.*, C. 518.M. 234. 1934. VII.) Hungary issued denial of charges. *N. Y. Times*, Nov. 29, 1934, p. 8. (*L. N. Doc.*, C. 539.M. 246. 1934. VII.) The dispute was heard by the Council and settled on Dec. 10, both countries accepting its resolution designed to outlaw "terrorism" and dissipate threat of war in Balkans. Summary of resolution: *N. Y. Times*, Dec. 11, 1934, p. 1; *L. N. M. S.*, Nov.-Dec., 1934.
- 22 PAN AMERICAN SANITARY CONFERENCE. Ninth conference closed a ten-day session in Buenos Aires. Dr. Hugh S. Cumming elected Director General of Pan American Sanitary Office. *N. Y. Times*, Nov. 23, 1934, p. 14.
- December, 1934*
- 2 BALTIC ENTENTE. Foreign Ministers of Estonia, Latvia and Lithuania held first periodical conference at Tallin for exchange of ratifications of treaty of Sept. 12, 1934, under which the *Entente* was organized. *C. S. Monitor*, Nov. 30, 1934, p. 4; *B. I. N.*, Dec. 6, 1934, p. 14.
- 3 FRANCE-GERMANY. Signed agreement to be effective in event Germany wins plebiscite. The financial and economic part of the agreement relates to payments by Germany to France for Saar coal mines, etc. The political part relates to status of Saar population after the plebiscite. Summary: *N. Y. Times*, Dec. 4, 1934, p. 1; *Times* (London), Dec. 4, 1934, p. 14; *Völkербund*, Dec. 14, 1934.
- 5 FRANCE-RUSSIA. Signed protocol in Geneva designed to prevent separate French or Russian negotiations with other nations tending to compromise Eastern Locarno plans. *N. Y. Times*, Dec. 7, 1934, p. 1. Text: *Economic Review of the Soviet Union*, Jan., 1935, p. 6.
- 5 IRAQ-PERSIA. Frontier dispute between the two countries referred to Council of the League of Nations under Art. 11 of the Covenant, by the Government of Iraq. *L. N. M. S.*, Dec., 1934, p. 286. (C. 22. M.10. 1935. VII.)

- 5-11 LEAGUE OF NATIONS COUNCIL. Held 83d (extraordinary) session for consideration of Hungarian-Yugoslav dispute, preparations for the Saar plebiscite, etc. *L.N.M.S.*, Dec., 1934; *L. N. O. J.*, Dec., 1934. Text of documents submitted to the Council: *Völkerbund*, Dec. 14, 1934.
- 9 FRANCE—RUSSIA. Signed trade agreement in Geneva. Text: *Economic Review of Soviet Union*, Jan., 1935, p. 7.
- 10 GREAT BRITAIN—ITALY. Signed air transport convention in Rome, extending for ten years provisions of convention signed on May 16, 1931. *B. I. N.*, Dec. 20, 1934, p. 21.
- 10 INTERNATIONAL CRIMINAL COURT. Plan for creation of Permanent World Penal Court of five members to end terrorism, submitted to League of Nations Council by Pierre Laval of France. *N. Y. Times*, Dec. 11, 1934, p. 1. Text: *Times* (London), Dec. 11, 1934, p. 15.
- 10 NOBEL PEACE PRIZE. Peace prize for 1934 presented at Oslo to Arthur Henderson, British president of the Conference for the Reduction and Limitation of Armament, and that of 1933, awarded to Sir Norman Angell, British author and lecturer. *N. Y. Times*, Dec. 11, 1934, p. 21; *Times* (London), Dec. 11, 1934, p. 15.
- 12 PERMANENT COURT OF INTERNATIONAL JUSTICE. By six votes to five the court found for the Belgian Government in dispute between Belgium and Great Britain regarding Oscar Chinn fluvial transport on Congo waters. History of the case: *C. S. Monitor*, Dec. 12, 1934, p. 1; *L. N. M. S.*, Dec. 1934, p. 301; *N. Y. Times*, Dec. 13, 1934, p. 6; *Publications of the Court*, Ser. A/B, No. 63; this JOURNAL, Jan., 1934, p. 6.
- 13 to Jan. 3, 1935 ABYSSINIA—ITALY. On Dec. 13, Abyssinian Foreign Office protested to League of Nations Council on clash between Abyssinian and Italian troops at Walwal on Dec. 5. Exchange of notes took place to Dec. 28. *L. N. M. S.*, Dec., 1934, p. 283. On Jan. 3 Abyssinia invoked Art. XI of the Covenant. Text: *N. Y. Times*, Jan. 4, 1935, p. 1. (*L. N. Doc.*, C49.M.22. 1935. VII.) *Cur. Hist.*, Feb., 1935, p. 583. The Council postponed action. Italy waived her demand for an apology and an indemnity, besides agreeing to negotiate the dispute "in the spirit of" the Italo-Ethiopian treaties of 1928. *N. Y. Times*, Jan. 27, 1935, IV, p. 5.
- 13 MEXICO—UNITED STATES. Exchanged ratifications of *en bloc* settlement of special claims, signed at Mexico City, April 24, 1934. The convention provides for a lump-sum settlement of the special claims of the United States by the payment by Mexico of an amount representing the same average percentage of liability as Mexico has agreed to pay on the same class of claims to European countries. *T. I. B.*, Dec., 1934, p. 24. Text: *U. S. Treaty Series*, No. 878. First annual installment of \$500,000 paid by Mexico Jan. 3, 1935, in accordance with Art. II of the convention. *Press Releases*, Jan. 5, 1935, p. 8; *N. Y. Times*, Jan. 4, 1935, p. 17.
- 19 NAVAL LIMITATION CONFERENCE. Conversations among the United States, Great Britain and Japan, which began in London on Oct. 23, adjourned on Dec. 19. Japan failed to obtain consent for naval equality. Text of official statement: *N. Y. Times*, Dec. 20, 1934, p. 1; *Times* (London), Dec. 20, 1934, p. 12.
- 25 PERSIA. Persian Foreign Office requests discontinuance of words Persia and Persian, beginning Mar. 22, 1935, and the use in their place of the words "Iran" and "Iranian." *Press Releases*, Jan. 26, 1935, p. 57.
- 28 ADATCI, MINETCIRO. Death announced. *Times* (London), Dec. 29, 1934, p. 12; *L. N. M. S.*, Dec., 1934, p. 298; Jan., 1935, p. 25.
- 29 ARGENTINA—SPAIN. Signed trade treaty in Buenos Aires. *N. Y. Times*, Dec. 30, 1934, p. 5.

- 29 JAPAN—UNITED STATES. Exchanged notes concerning denunciation by Japan of Washington Naval Treaty of Feb. 6 1922. Statement by Secretary Hull: *Press Releases*, Jan. 5, 1935, p. 2; *N. Y. Times*, Dec. 30, 1934, p. 14.
- 31 GERMANY—UNION OF SOUTH AFRICA. Signed wool agreement in Pretoria. *Times* (London), Jan. 1, 1935, p. 13.

*January, 1935*

- 3 FOREIGN SERVICE. In accordance with act of Mar. 26, 1934 (Public, No. 129), rectification of pay was completed to the 10,800 employees of the United States Government serving abroad. Average exchange value for five years taken in fixing rates. *C. S. Monitor*, Jan. 3, 1935, p. 1.
- 3 GREAT BRITAIN—IRISH FREE STATE. Limited trade agreement signed at London. *N. Y. Times*, Jan. 4, 1935, p. 11; *Times* (London), Jan. 4, 1935, p. 12.
- 4 SPAIN—URUGUAY. Signed trade agreement in Montevideo to remain in force for a year. *B. I. N.*, Jan. 10, 1935, p. 30.
- 5 *P'm Alone* CASE. American-Canadian Commissioners held final session in Washington, Dec. 28, 1934-Jan. 5, 1935, and on the latter date delivered to the Secretary of State its joint final report on account of the claim made by Canada in respect of the ship *P'm Alone*. *Press Releases*, Jan. 12, 1935, p. 18; *N. Y. Times*, Jan. 10, 1935, p. 10. Text of interim and joint final reports: this JOURNAL, *infra*, p. 326. Apology of United States in letter from Secretary Hull delivered to Canadian Minister. Text in part: *N. Y. Times*, Jan. 22, 1935, p. 8.
- 7 FRANCE—ITALY. A three-day conference in Rome between M. Laval and Premier Mussolini ended in signing of accord (Pact of Rome) embodying general declaration that pending questions had been settled and registering community of views existing between their governments on questions of European order. Colonial demands made by Italy for additions to her territory in Africa were partially accepted by France. Text of communiqué: *N. Y. Times*, Jan. 8, 1935, p. 1; *B. I. N.*, Jan. 10, 1935; *Cur. Hist.*, Feb., 1935, p. 582. Text of general declaration: *Times* (London), Jan. 12, 1935, p. 11.
- 9 LITHUANIA—UNITED STATES. Exchanged ratifications of supplementary extradition treaty, signed May 17, 1934. *Press Releases*, Jan. 12, 1935, p. 24. Text: *U. S. Treaty Series*, No. 879.
- 10 GREAT BRITAIN—INDIA. Signed trade agreement supplementary to Ottawa agreements. Text: *Times* (London), Jan. 11, 1935, p. 14, *Cmd.* 4779.
- 10-29 PERMANENT COURT OF INTERNATIONAL JUSTICE. On Jan. 10, the U. S. Senate Committee on Foreign Relations reported favorably by vote of 14 to 7, the resolution with reservations, to ratify protocols for adherence of the United States. Text of resolution: *Cong. Record*, Jan. 14, 1935, p. 424; *N. Y. Times*, Jan. 17, 1935, p. 18. On Jan. 29, the Senate voted against adherence (52 to 36), seven ballots short of the two-thirds majority needed. *Cong. Record*, Jan. 29, 1935, p. 1217.
- 10 SWITZERLAND—UNITED STATES. Signed supplementary extradition treaty in Washington. *Press Releases*, Jan. 12, 1935, p. 24.
- 11-21 LEAGUE OF NATIONS COUNCIL. Held 84th session for discussion of disputes between Iraq and Persia (Iran), Abyssinia and Italy, Yugoslavia and Hungary, Finnish and Swiss claims for war damages, and Saar problems resulting from the plebiscite. It was decided to transfer the Saar to Germany on March 1. *N. Y. Times*, Jan. 11-22, 1935; *Times* (London), Jan. 12-22, 1935. Special article on the Saar: *N. Y. Times*, Jan. 20, 1935, IV, 2. *L. N. M. S.*, Jan., 1935.

- 11 **LITTLE ENTENTE.** Permanent Council met at Ljubljana in special session to consider Franco-Italian agreements of Jan. 7. The three Ministers announced willingness, in principle, to adhere to those of the Rome agreements which are open for signature. *Times* (London), Jan. 12, 1935, p. 11.
- 13 **SAAR PLEBISCITE, 1935.** Voting in the plebiscite took place throughout the Territory on Jan. 13. On Jan. 15, the result was announced and showed that 477,119 voters had voted for a return to Germany, 46,513 for the *status quo*, 2,124 for union with France. These figures represented 90.8 per cent, 8.87 per cent, and 0.4 per cent respectively, of the electorate, of which 97.9 per cent went to the polls. The number of invalid papers was 901, and of blank papers, 1,256. *N. Y. Times*, Jan. 15, 1935, p. 1. Chancellor Hitler's address: *Times* (London), Jan. 16, 1935, p. 10; *L. N. Doc.* (C. 44(1) M. 19(1) 1935. VII.)
- 16 **NETHERLANDS—NORWAY.** Signed treaty of arbitration and conciliation, providing for Permanent Commission of Conciliation. *B. I. N.*, Jan. 25, 1935, p. 27.
- 20 **AUSTRIA—CANADA.** Provisional trade agreement, giving Canada most-favored-nation treatment, signed July 10, 1933, has been extended indefinitely. *Times* (London), Jan. 21, 1935, p. 11.
- 28 **GERMANY—IRISH FREE STATE.** Signed trade agreement in Dublin. *N. Y. Times*, Jan. 29, 1935, p. 5.
- 30 **FRANCE—GERMANY.** First three paragraphs of Saar Convention signed in Basle: (1) Customs boundary, (2) Withdrawal of French currency and its exchange into Reichsmarks, (3) Technical agreement on Saar funds, deposited at the B. I. S. *Times* (London), Feb. 1, 1935, p. 13.
- 31 **INTERNATIONAL LABOR OFFICE.** Governing Body decided that Belgium and Canada must be dropped as permanent members to make way for the United States and Russia. *N. Y. Times*, Feb. 1, 1935, p. 7; *I. L. O. M. S.*, Jan., 1935.
- 31 **RUSSIA—UNITED STATES.** Fourteen months of negotiations for settlement of debt question and claims of American citizens against Russia terminated when Ambassador Troyanovsky told Secretary Hull that offer made last fall was unacceptable. State Dept. communiqué: *N. Y. Times*, Feb. 1, 1935, p. 1, 4. Export-Import bank to be dissolved. *Press Releases*, Feb. 2, 1935, p. 62. See editorial in this JOURNAL, *supra*, p. 290.

#### February, 1935

- 1 **MEXICO—UNITED STATES.** Exchanged ratifications of General Claims Convention, signed June 18, 1932, extending for two years from date of exchange of ratifications thereof, the time assigned for the hearing, examination and decision of claims for loss or damage prior to Aug. 30, 1927. At the same time ratifications were exchanged of a protocol signed at Mexico City on April 24, 1934, by which both governments agree each to name a commissioner to appraise on their merits the claims of both governments which have already been fully pleaded and briefed and those in which pleadings and briefs shall be completed. *Press Releases*, Feb. 2, 1935, p. 63-64.
- 2 **AUSTRIA—ITALY.** Signed agreement to encourage cultural and artistic exchanges. *N. Y. Times*, Feb. 3, 1935, p. 29.
- 2 **BRAZIL—UNITED STATES.** Signed reciprocal trade agreement in Washington. *N. Y. Times*, Feb. 3, 1935, p. 1; Summary: *Press Releases*, Feb. 2, 1935, p. 64.

## INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919.

*Adhesion:* Spain. *T. I. B.*, Dec., 1934, p. 1E.

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol of amendments, Paris, June 15 and Dec. 11, 1929.

*Adhesion:* Argentina. Oct. 2, 1934. *T. I. B.*, Nov., 1934, p. 9.

AIR TRAFFIC. Warsaw, Oct. 12, 192E.

*Adhesion:* India.

*Ratification deposited:* Czechoslovakia. *T. I. B.*, Dec., 1934, p. 18.

ASYLUM. Montevideo, Dec. 26, 1933.

*Ratification:* Dominican Republic. Oct. 25, 1934. *T. I. B.*, Nov., 1934, p. 6.

BALTIC ENTENTE. Geneva, Sept. 12, 1934.

*Ratification:* Estonia. *T. I. B.*, Nov., 1934 p. 5.

ECONOMIC STATISTICS AND PROTOCOL. Geneva Dec. 14, 1928.

*Accession:* Chile. Nov. 20, 1934. *L. N. O. J.*, Dec., 1934; *T. I. B.*, Dec., 1934, p. 22.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

*Ratification:* Italy. *L. N. O. J.*, Dec., 1934

*Ratification deposited:* Great Britain on behalf of India. *T. I. B.*, Nov., 1934, p. 6.

FOREIGN ARBITRAL AWARDS. Geneva, Sept. 26, 1927.

*Accession:* Malta. Oct. 11, 1934. *L. N. O. J.*, Dec., 1934; *T. I. B.*, Nov., 1934, p. 10.

GENERAL ACT FOR PACIFIC SETTLEMENT. Geneva, Sept. 26, 1928.

*Accession:* Switzerland and Turkey. *L. N. O. J.*, Jan., 1935.

INDUSTRIAL PROPERTY. The Hague, Nov. 6, 1925.

*Adhesion:* Japan (including Korea, Formosa and South Sakhalin). *T. I. B.*, Dec., 1934, p. 20.

INTER-AMERICAN CONCILIATION. Washington Jan. 5, 1929.

*Ratification deposited:* Uruguay. Oct. 15, 1934. *T. I. B.*, Nov., 1934, p. 2.

LOAD LINE CONVENTION. London, July 5, 1930.

*Ratification deposited:* Great Britain on behalf of India. *T. I. B.*, Nov., 1934, p. 14.

MARITIME CONVENTIONS: (1) Collisions. (2) Salvage at sea. Brussels, Sept. 23, 1910.

*Adhesion:* Italy (on behalf of Eritrea and Italian Somaliland). *T. I. B.*, Dec., 1934, p. 20.

MOTOR VEHICLES TAXATION. Geneva, Mar. 3E 1931.

*Ratification:* Switzerland. Oct. 19, 1934. *L. N. O. J.*, Dec., 1934.

NARCOTICS. Geneva, July 13, 1931.

*Ratifications deposited:*

Honduras. Sept. 21, 1934. *T. I. B.*, Nov. 1934, p. 7.

Greece. Dec. 7, 1934. *L. N. O. J.*, Jan., 1935.

NATIONALITY OF WOMEN CONVENTION. Montevideo, Dec. 16, 1933.

*Proclamation:* Chile. Nov. 12, 1934. *T. I. B.*, Dec., 1934, p. 15.

*Ratification:* Mexico. Dec. 29, 1934. *Equal Rights* (Baltimore), Mar. 2, 1935, p. 71.

NAVAL LIMITATION TREATY. Washington, Feb. 6, 1922.

*Denunciation:* Japan. Dec. 29, 1934. *Press Releases*, Jan. 5, 1935, p. 2; *T. I. B.*, Dec., 1934, p. 4; *N. Y. Times*, Dec. 30, 1934, p. 1E.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

*Ratification:* Colombia. Nov. 8, 1934. *L. N. O. J.*, Dec., 1934.

OPIMUM CONVENTION. 2d. Geneva, Feb. 19, 1925.

*Adhesion:* Costa Rica. Dec. 8, 1934; *T. I. B.*, Dec., 1934, p. 16.

*Ratification deposited:* Ecuador. Oct. 23, 1934. *T. I. B.*, Nov., 1934, p. 7.

OPIMUM SMOKING. Bangkok, Nov. 27, 1931.

*Ratification:* Siam. Nov. 19, 1934. *L. N. O. J.*, Dec., 1934.

POSTAL CONVENTION. Cairo, Mar. 20, 1934.

*Adhesion:* Luxemburg.

*Ratification:* Switzerland. *T. I. B.*, Nov., 1934, p. 14.

*Ratification deposited:* Philippine Islands. *T. I. B.*, Dec., 1934, p. 21.

POSTAL UNION OF THE AMERICAS AND SPAIN. Madrid, Nov. 10, 1931.

*Ratification:* Ecuador. *T. I. B.*, Dec., 1934, p. 22.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.

*Ratifications:*

Italy. Dec. 10, 1934. *L. N. O. J.*, Jan., 1935.

Latvia. Oct. 8, 1934. *L. N. O. J.*, Dec., 1934.

REFUGEES. (International Status.) Geneva, Oct. 28, 1933.

*Ratification:* Bulgaria. Dec. 19, 1934. *L. N. O. J.*, Jan., 1935.

ROAD SIGNALS. Geneva, Mar. 30, 1931.

*Ratification:* France and Switzerland. *L. N. O. J.*, Dec., 1934.

SAFETY AT SEA. London, May 31, 1929.

*Accession:* New Zealand. *T. I. B.*, Dec., 1934, p. 16.

*Ratification deposited:* Great Britain on behalf of India. Oct. 1, 1934. *T. I. B.*, Nov., 1934, p. 8.

UNIVERSAL POSTAL UNION. London, June 28, 1929.

*Ratification:* Ecuador. *T. I. B.*, Dec., 1934, p. 21.

WHALING. Geneva, Sept. 24, 1931.

*Ratifications deposited:* Great Britain and Northern Ireland and British Dominions. Oct. 18, 1934. *T. I. B.*, Nov., 1934, p. 13.

Came into force on Jan. 10, 1935. *L. N. M. S.*, Jan., 1935, p. 16.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.

*Ratification:* Colombia. Nov. 8, 1934. *L. N. O. J.*, Dec., 1934.

WHITE SLAVE TRADE. (Women of full age.) Geneva, Oct. 11, 1933.

*Ratification:* Bulgaria. Nov. 12, 1934. *L. N. O. J.*, Jan., 1935.

WORKMEN'S COMPENSATION FOR ACCIDENTS. (Equality of treatment.) Geneva, June 5, 1925.

*Ratification deposited:* Lithuania. *T. I. B.*, Nov., 1934, p. 13.

M. ALICE MATTHEWS

## CLAIM OF THE BRITISH SHIP "I'M ALONE" v. UNITED STATES

### REPORTS OF THE COMMISSIONERS<sup>1</sup>

The *I'm Alone*, a British ship of Canadian registry, but *de facto* owned, controlled and managed by a group of American citizens engaged in smuggling liquor into the United States, was sunk on the high seas in the Gulf of Mexico by a United States coast guard patrol boat, with the loss of one member of the *I'm Alone's* crew, on March 22, 1929, after a hot pursuit which began on March 20 within twelve miles of the United States coast. (See article in this JOURNAL, Vol. 23, p. 351.)

*Held*, that under the Convention of Jan. 23, 1924, between the United States and Great Britain to prevent the smuggling of intoxicating liquors into the United States, the Commissioners could inquire into the beneficial ownership of the *I'm Alone*, and that the United States might use necessary and reasonable force to board, search, seize and bring the suspected vessel into port; but that the admittedly intentional sinking of the vessel was not justified by anything in the Convention or by any principle of international law.

*Held further*, that no compensation ought to be paid in respect of the loss of the ship or cargo, but that the United States ought to apologize to Canada and pay that Government the sum of \$25,000 as a material amend, and also pay the additional sum of \$26,666.50 for the benefit of the captain and crew of the *I'm Alone*, none of whom was a party to the illegal conspiracy to smuggle liquor into the United States and sell the same there.

### JOINT INTERIM REPORT OF THE COMMISSIONERS<sup>2</sup>

*Dated the 30th June, 1933*

The Honourable the Secretary of State  
for the United States of America; and  
The Right Honourable  
The Minister of External Affairs for Canada.

*Excellencies:*

Willis Van Devanter and Lyman Poore Duff, the Commissioners appointed respectively by the high contracting parties pursuant to Article 4 of the Convention of the 23rd day of January, 1924, between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas and the President of the United States of America, beg leave to present the following interim report and recommendations.

In compliance with a direction given on the 28th of January, 1932, the agents and counsel of the high contracting parties respectively have sub-

<sup>1</sup> Appointed pursuant to Art. 4 of the Convention of Jan. 23, 1924, between Great Britain and the United States to aid in the prevention of the smuggling of intoxicating liquors into the United States (printed in this JOURNAL, Supplement, Vol. 13, p. 127). American Commissioner: Hon. Willis Van Devanter, Associate Justice of the United States Supreme Court; Canadian Commissioner: Right Hon. Lyman Poore Duff, Senior Puisne Judge of the Supreme Court of Canada.

<sup>2</sup> Reprinted from *Claim of the British Ship "I'm Alone,"* Ottawa, 1933. This document contains also a Statement with Regard to the Claims for Compensation submitted by the Canadian Agent.

mitted briefs and oral argument in relation to certain preliminary questions which are here set forth; and the Commissioners, in the exercise of their duty under the authority conferred upon them by the appointment aforesaid, have given and do give the answers hereinafter respectively appended to these questions:

The question numbered one is in the following terms:

The first question is whether the Commissioners may enquire into the beneficial or ultimate ownership of the *I'm Alone* or of the shares of the corporation that owned the ship. If the Commissioners are authorized to make this enquiry, a further question arises as to the effect of indirect ownership and control by citizens of the United States upon the Claim; viz., whether it would be an answer to the Claim under the Convention, or whether it would go to mitigation of damages, or whether it would merely be a circumstance that should actuate the claimant Government in refraining from pressing the claim, in whole or in part.

The answer given to this question is as follows:

The Commissioners think they may enquire into the beneficial or ultimate ownership of the *I'm Alone* and of the shares of the corporation owning the ship; as well as into the management and control of the ship and the venture in which it was engaged; and that this may be done as a basis for considering the recommendations which they shall make. But the Commissioners reserve for further consideration the extent to which, if at all, the facts of such ownership, management and control may affect particular branches or phases of the claim presented.

The question numbered two is in the following terms:

The second question relates to the right of hot pursuit. Further, it has two aspects, and it is based upon the assumption that the averments in the Answer with regard to the location and speed of the *I'm Alone* are true. The question in its first aspect is whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the pursuit and beyond that distance at its termination. The question in its second aspect is whether the Government of the United States has the right of hot pursuit of a vessel when the pursuit commenced within the distance of twelve miles established by the revenue laws of the United States and was terminated on the high seas beyond that distance.

The answer given to this question is as follows:

As respects the question in its first aspect, viz.,

whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the pursuit and beyond that distance at its termination,

the Commissioners are as yet not in agreement as to the proper answer, nor have they reached a final disagreement on the matter. The Commissioners, therefore, suggest that the proceeding go forward and that the evidence be produced in an orderly way, leaving the Commissioners free to give further consideration to the matter and to announce their agreement or disagreement thereon as the case may be.

The question in its second aspect need not be answered because the Government of the United States has now withdrawn so much of its answer as led to the propounding of that aspect of the question.

The question numbered three is in the following terms:

The third question is based upon the assumption that the United States Government had the right of hot pursuit in the circumstances and was entitled to exercise the rights under Article 2 of the Convention at the time when the *Dexter* joined the *Wolcott* in the pursuit of the *I'm Alone*. It is also based upon the assumption that the averments set forth in paragraph eight of the Answer are true. The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone*.

The answer given to this question is as follows:

On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.

Having thus answered the preliminary questions, the Commissioners have had under consideration the practical application of their answers to the future conduct of the case.

They, accordingly, make to the two Governments the following recommendations:

*First:* that the agents be instructed by their respective Governments to prepare and submit to the Commissioners separate statements setting forth in detail the contentions of their respective Governments as to the ultimate beneficial interests in the vessel and in the cargo, together with specifications of the documents and witnesses relied upon to substantiate their respective contentions:

*Second:* that the agents be similarly instructed to submit to the Commissioners either a joint statement or separate statements (in either case specifically itemized) of the sums which should be payable by the United States in case the Commissioners finally determine that compensation is payable by that Government.

Upon compliance with the foregoing recommendations the Commissioners will notify the agents by what procedure the resulting issues of fact will be determined and upon such determination will make a final recommendation.

The Commissioners have the honour to be, Excellencies,

Your most humble, obedient servants,

WILLIS VAN DEVANTER  
LYMAN P. DUFF

## JOINT FINAL REPORT OF THE COMMISSIONERS

*Dated January 5, 1935*

(Filed with the Secretary of State at Washington and the Minister of External Affairs for Canada at Ottawa, January 9, 1935)

The Honourable the Secretary of State  
for the United States of America; and  
The Right Honourable  
The Minister of External Affairs for Canada.

*Excellencies:*

The Commissioners appointed respectively by the High Contracting Parties pursuant to Article 4 of the Convention of the 23rd of January, 1924, between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, and the President of the United States of America, did, on the 30th of June, 1933, present an interim report and recommendations concerning the matters submitted to them for consideration.

The interim report and recommendations are before Your Excellencies.

The Commissioners therein returned answers to certain preliminary questions, set forth in a direction given by them on the 28th of January, 1932, in relation to which the agents and counsel of the High Contracting Parties had submitted briefs and oral argument.

Only questions numbered One and Three and the answers given thereto are now material. These are stated in the interim report as follows:

The question numbered one is in the following terms:

The first question is whether the Commissioners may enquire into the beneficial or ultimate ownership of the *I'm Alone* or of the shares of the corporation that owned the ship. If the Commissioners are authorized to make this enquiry, a further question arises as to the effect of indirect ownership and control by citizens of the United States upon the Claim; viz., whether it would be an answer to the Claim under the Convention, or whether it would go to mitigation of damages, or whether it would merely be a circumstance that should actuate the claimant Government in refraining from pressing the claim, in whole or in part.

The answer given to this question is as follows:

The Commissioners think they may enquire into the beneficial or ultimate ownership of the *I'm Alone* and of the shares of the corporation owning the ship; as well as into the management and control of the ship and the venture in which it was engaged; and that this may be done as a basis for considering the recommendations which they shall make. But the Commissioners reserve for further consideration the extent to which, if at all, the facts of such ownership, management and control may affect particular branches or phases of the claim presented.

The question numbered three is in the following terms:

The third question is based upon the assumption that the United States Government had the right of hot pursuit in the circumstances and was entitled to exercise the rights under Article 2 of the Convention at the time when the *Dexter* joined the *Wolcott* in the pursuit of the *I'm Alone*. It is also based upon the assumption that the averments set forth in paragraph eight of the Answer are true. The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone*.

The answer given to this question is as follows:

On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.

The preliminary questions having been answered, the Commissioners made the following recommendations as to the future conduct of the case:

First: that the agents be instructed by their respective Governments to prepare and submit to the Commissioners separate statements setting forth in detail the contentions of their respective Governments as to the ultimate beneficial interests in the vessel and in the cargo, together with specifications of the documents and witnesses relied upon to substantiate their respective contentions.

Second: that the agents be similarly instructed to submit to the Commissioners either a joint statement or separate statements (in either case specifically itemized) of the sums which should be payable by the United States in case the Commissioners finally determine that compensation is payable by that Government.

Statements were submitted to the Commissioners pursuant to these recommendations; and, on the 28th of December, 1934, the Commissioners convened for the purpose of hearing further evidence and oral argument touching the matters in dispute; and the hearing was concluded on the 3rd of January, 1935. The Commissioners now present their joint final report.

It will be recalled that the *I'm Alone* was sunk on the 22nd day of March, 1929, on the high seas, in the Gulf of Mexico, by the United States revenue cutter *Dexter*. By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law.

The vessel was a British ship of Canadian registry; after her construction she was employed for several years in rum running, the cargo being destined for illegal introduction into, and sale in, the United States. In December, 1928, and during the early months of 1929, down to the sinking of the vessel on the 22nd of March, of that year, she was engaged in carrying liquor from Belize, in British Honduras, to an agreed point or points in the Gulf of Mexico in convenient proximity to the coast of Louisiana, where the liquor was taken from her in smaller craft, smuggled into the United States, and sold there.

We find as a fact that, from September, 1928, down to the date when she was sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned. The possibility

that one of the group may not have been of United States nationality we regard as of no importance in the circumstances of this case.

The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of \$25,000 to His Majesty's Canadian Government; and they recommend accordingly.

The Commissioners have had under consideration the compensation which ought to be paid by the United States to His Majesty's Canadian Government for the benefit of the captain and members of the crew, none of whom was a party to the illegal conspiracy to smuggle liquor into the United States and sell the same there. The Commissioners recommend that compensation be paid as follows:

For the captain, John Thomas Randell, the sum of .....	\$7,906.00
For John Williams, deceased, to be paid to his proper representatives.....	1,250.50
For Jens Jansen.....	1,098.00
For James Barrett.....	1,032.00
For William Wordsworth, deceased, to be paid to his proper representatives...	907.00
For Eddie Young .....	999.50
For Chesley Hobbs.....	1,323.50
For Edward Fouchard .....	965.00
For Amanda Mainguy, as compensation in respect of the death of Leon Mainguy, for the benefit of herself and the children of Leon Mainguy (Henriette Main- guy, Jeanne Mainguy and John Mainguy) the sum of.....	10,185.00

In submitting this, their final report,

The Commissioners have the honour to be, Excellencies,

Your most humble, obedient servants,

(Signed) WILLIS VAN DEVANTER

(Signed) LYMAN POORE DUFF

## SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY *v.* STATE OF DELAWARE \*

*Decided February 5, 1934*

The boundary between Delaware and New Jersey within a circle of twelve miles about the town of New Castle is the low water mark of the Delaware River on the east or New Jersey side. Delaware's title to the bed within the circle is derived from a deed from the Duke of York to William Penn dated Aug. 24, 1682, followed by letters patent from the Crown to the Duke of York to rectify his title. This title was confirmed by practically uninterrupted possession of the Delaware territory on the part of Penn and his successors up to the American Revolution. The Declaration of Independence made Delaware a State with boundaries

\* 291 U. S. Reports, p. 361.

fixed as of that time, and by the Treaty of Peace of 1783 the State of Delaware succeeded to dominion over the same territory.

By the law of waters of many of our states, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, but there can be no legitimate inference that from acquiescence in such improvements on the river front Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. Almost from the beginning of statehood, Delaware and New Jersey have been engaged in a dispute as to the boundary between them. In such circumstances there is no room for the application of the principle that long acquiescence may establish a boundary otherwise uncertain.

Below the twelve-mile circle the title to the soil of the lower river and bay is unaffected by any grant to the Duke of York or others. International law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical center half-way between the banks. It applies the same doctrine, now known as the doctrine of the *thalweg*, to estuaries and bays in which the track taken by boats in their course down the stream, which is that of the strongest current, can be followed to the sea. Bays and rivers are more than geometrical divisions. They are the arteries of trade and travel. Below the twelve-mile circle, the true boundary between Delaware and New Jersey will be adjudged to be the middle of the main ship channel in Delaware River and Bay.

Mr. Justice Cardozo delivered the opinion of the court.

Invoking our original jurisdiction, New Jersey brings Delaware into this court and prays for a determination of the boundary in Delaware Bay and River.

The controversy divides itself into two branches, distinct from each other in respect of facts and law. The first branch has to do with the title to the bed or subaqueous soil of the Delaware River within a circle of twelve miles about the town of New Castle. Delaware claims to be the owner of the entire bed of the river within the limits of this circle up to low water mark on the east or New Jersey side. New Jersey claims to be the owner up to the middle of the channel. The second branch of the controversy has to do with the boundary line between the two states in the river below the circle and in the bay below the river. In that territory as in the river above, New Jersey bounds her title by the *Thalweg*. Delaware makes the division at the geographical centre, an irregular line midway between the banks or shores.

The Special Master appointed by this court in January, 1930 (280 U. S. 529) has now filed his report. As to the boundary within the circle, his report is in favor of Delaware. To that part of the report exceptions have been filed by New Jersey. As to the boundary in the bay and in the river below the circle, his report is in favor of New Jersey. To that part exceptions have been filed by Delaware. The two branches of the controversy will be separately considered here.

*First. The boundary within the circle.*

Delaware traces her title to the river bed within the circle through deeds going back two and a half centuries and more.

On August 24, 1682, the Duke of York delivered to William Penn a deed of feoffment for the twelve mile circle whereby he conveyed to the feoffee "ALL THAT the Towne of Newcastle otherwise called Delaware and All that Tract of Land lying within the Compass or Circle of Twelve Miles about the same scituate lying and being upon the River Delaware in America And

all Islands in the same River Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of Twelve Miles about the said Towne." On October 28, 1682, there was formal livery of seisin of the lands and waters within the twelve mile circle. John Moll and Ephraim Herman, attorneys appointed in the deed of feoffment, gave possession and seisin "by delivery of the fort of the sd Town and leaving the sd William Penn in quiet and peaceable possession thereof and allso by the delivery of turf and twig and water and Soyle of the River of Delaware." "We did deliver allso unto him one turf with a twigg upon it a porringer with River water and Soyle in part of all what was specified in the sd Indentures or deeds."

By force of these acts there was conveyed to the feoffee any title to the river bed within the circle that then belonged to the feoffor. New Jersey insists, however, that the feoffor, the Duke of York, was not then the owner of any territory west of the easterly side of the Delaware River, and hence at the time of the feoffment had no title to convey. Letters patent from Charles II, dated May 12, 1664, had granted to the Duke full title to and government of a large territory in America, embracing much of New England and in particular "all the land from the west side of Connecticut River to the east side of Delaware Bay," not including, however, lands or waters to the west. True the Duke had gone into possession of lands westward of the grant, including land within the circle, and through his delegates and deputies was exercising powers of government. His acts in that behalf were the outcome of conflicts with the Dutch. What is now the State of Delaware had been subject to the government of the Dutch until 1664, when with the victory of the English arms it became an English colony. From that time until August 24, 1682, the date of the deed of feoffment, Delaware was governed (with the exception of a brief period from July, 1763, to February 9, 1764) as a dependency of the Government and Colony of New York through governors commissioned by the Duke of York and Albany. Upon the delivery of the deed to Penn, the Duke was the *de facto* overlord of the land within the circle, though title at that time was still vested in the Crown.

The deed of feoffment had in it a covenant for further assurance at any time within seven years. At the instance of Penn and with little delay, the feoffor took steps to carry out this covenant and thus rectify his title. On March 22, 1682/3, letters patent under the Great Seal of England were issued to the Duke of York for the identical lands and waters described in the deed of feoffment from York to William Penn.<sup>1</sup> There is no doubt that these let-

<sup>1</sup> The following is the description:

"All that the Towne of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the

ters were delivered to the Duke. The Special Master has found upon evidence supporting the conclusion that they were afterwards delivered to Penn from whom they passed to his descendants. The Master also found, and again upon sufficient evidence, that the letters patent so delivered "were never thereafter surrendered, nor was the grant of lands and waters thereby made ever abandoned nor was its validity ever impaired by any act or proceeding." By force of this grant there passed to the Duke of York a title to the land within the circle which inured by estoppel to the grantee under the feoffment.

The applicable principle in such circumstances is among the rudiments of the law of property. The covenant generating the estoppel is commonly one of warranty or seisin. *Irvine v. Irvine*, 9 Wall. 617; *Van Rensselaer v. Kearney*, 11 How. 297, 323, 325; *Tefft v. Munson*, 57 N. Y. 97; *Vanderheyden v. Crandall*, 2 Denio 9; *aff'd* 1 N. Y. 491; *White v. Patten*, 24 Pick. 324.<sup>2</sup> The effect is the same where the covenant is one for further assurance. *Taylor v. Debar*, 1 Chan. Cas. 274 (1676); *Lamb v. Carter*, 14 Fed. Cas. 991; 1 Sawy. 212; *Wholey v. Cavanaugh*, 88 Cal. 132; *Hope v. Stone*, 10 Minn. 114; *Norfleet v. Russell*, 64 Mo. 176. To enforce that conclusion we do not need to wander far afield and consider other deeds than the specific one in question. There exists for our enlightenment the opinion of the Chancellor in an historic litigation where the relation between the feoffment of August, 1682, and the later patent from the Crown, was the very point at issue. A dispute had arisen between Lord Baltimore and Penn as to the title to part of the Delaware territory. On May 10, 1732, after Penn was in his grave, there was an agreement between his sons and Baltimore for the settlement of the boundaries between Pennsylvania, Delaware and Maryland. Three years later a bill was filed in Chancery for the specific performance of the agreement of May, 1732, to which suit the Attorney General was made a party as the representative of the Crown.<sup>3</sup> The Duke of York had become King under the name of James II on February 6, 1685, and George II sat upon the throne when the cause in Chancery was heard. The Lord Chancellor, Hardwicke, gave judgment for the Penns. *Penn v. Lord Baltimore*, 1 Ves. Sen. 444; also *Ridg. t H.* 332. In his opinion he holds that the effect of the letters patent is to make the deed of feoffment good either by force of an estoppel or by converting the feoffor into a trustee for the feoffee. The objection is

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said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen."

Powers of government and other proprietary and seignorial rights were granted to the Duke along with ownership of the fee.

<sup>2</sup> Compare, however, as to covenants of seisin, *Doane v. Willcut*, 5 Gray 328; *Allen v. Sayward*, 5 Me. 446.

<sup>3</sup> The Attorney General filed two answers in the cause, neither of which asserted any beneficial title in the Crown, but merely prayed that the court might "Preserve all such Rights Title and Interest of in or to the Premises as shall appertain or belong to his Majesty."

urged upon him that an estoppel will not prevail against the Crown. The Chancellor makes it plain that he is not favorably impressed. "For the Duke of York, being then [*i. e.*, at the date of the feoffment] in nature of a common person, was in a condition to be estopped by a proper instrument." At the same time, he is diffident about declaring a technical estoppel, nor is there need to go so far. If his Majesty was not estopped, he was in any event a trustee of the title for the use of the feoffee, which will bring about a like result. "The Duke of York . . . while a subject was to be considered as a trustee; why not afterwards as a royal trustee?" "His successors take the legal estate under the same equity; and it is sufficient for plaintiffs if they have an equitable estate." So Lord Baltimore must make performance in accordance with the contract. True, the decree for performance will be "without prejudice to any prerogative, right, or interest in the Crown." This again is by virtue of the deference owing to the Crown by the keeper of his conscience. "Being liberated from the restraints of the lord chancellor, we are at liberty to say, that the duke, at the date of the deeds, being a subject, was, in this respect, only 'a common person,' and as much bound by estoppel as any other subject." Per Sergeant, Arbitrator, in the case of *Pea Patch Island*, 30 Fed. Cas. 1123, 1151.

In the meantime Penn had proceeded to organize a government for the Delaware territory. On October 29, 1682, he issued a summons to persons of note in the community to meet him at the Town of New Castle on November 2 for the holding of a General Court to settle the jurisdiction of the territory. At that court he announced his title derived from the Duke of York, and instructed the magistrates that until laws were enacted by a proper assembly they should take for their guide the laws that had been provided by his Royal Highness for the Province of New York, promising that they should be governed thereafter by such laws and orders as they should consent to by their own deputies and representatives. A general assembly having been summoned, an Act of Union was passed, December 7, 1682, whereby the three counties of Delaware territory were annexed to Pennsylvania. In the same month was enacted an Act of Settlement providing for a Provincial Council and Assembly and reciting the letters patent to Pennsylvania and the deeds of release and feoffment from the Duke of York. Following the establishment of this government, Penn and his successors as proprietaries and governors, and the Assembly and Council of the Province, together with the Assembly of the Lower Counties subsequently established, continued to exercise the power of government in all its plenitude over Pennsylvania and the Delaware territory. This continued until the Revolution except for a brief interruption during the reign of William and Mary.

There were, it is true, intermittent challenges both of the proprietary interest of Penn and his successors and of their governmental powers. As to these last, the most serious challenge was one that followed the accession of William and Mary in February, 1689, after the deposition of James II as the

result of the "Glorious Revolution." Penn, who had been a favorite of royalty during the reign of James, was for a time under a cloud. In 1692, he was removed from the Government of Pennsylvania, including the New Castle country, and his place given to a successor. But he was soon restored to power, and, it seems, to the royal confidence. In August, 1694, there was an Order in Council by which he was reestablished in his former office. In the same month letters patent issued under the Great Seal of State restoring him in the most formal way to the administration of the government of the "said province and territories," and revoking any other appointment inconsistent therewith.

This patent, it would seem, had settled for all time the validity of his exercise of governmental powers, however much it may have left in doubt his title to the land. Mutterings of uncertainty, however, continued to be heard as to his rights and powers in both aspects. In 1701, he had correspondence with the Board of Trade which showed itself restless on the subject of his ownership. At intervals during the reign of Anne and afterwards he was required to sign a declaration that the approval by the Crown of his governmental acts, such as the appointment of a deputy, was not to be construed in any manner to diminish "her Majesty's claim of right to the said three lower counties." But the claims of right thus reserved were never admitted by Penn to be valid, nor were they ever pressed by the Crown. Not even the petitions of jealous rivals, egging the Crown on, were of avail to wake it into action. Thus, in 1717, the Earl of Sutherland applied for a grant of the three Lower Counties, asserting that he was ready to prove that the title was in the Crown. The Attorney General issued a summons to Penn to be present at a hearing, but Penn, who had suffered a stroke of apoplexy, was unable to appear, and the proceeding was allowed to lapse. A like fate awaited similar petitions submitted in later years. Reservations of the royal claims might continue to be made by cautious scribes. By the time of the Revolution they were little more than pious formulas. A title, good of record when reinforced by the patent of 1683, had been confirmed by a century of undisturbed possession. When the Treaty of Paris was signed in 1763, the land within the circle was part of the territory of Delaware, and the title was in the Penns or in persons claiming under them.

The Declaration of Independence had made Delaware a state with boundaries fixed as of that time. Nothing that was done by her legislature thereafter has had the effect of cutting down her territorial limits, however much it may have affected the private ownership of the Penns and their successors. Nothing thereafter done has had the effect of adding to the territory then belonging to New Jersey. Even so, a word must be said as to resolutions and statutes that became a law in Delaware shortly after the treaty of peace, since they are much relied upon by New Jersey as marking the true boundary. The legislation is directed to the disposition of unappropriated lands. A resolution of January 16, 1793, recommends to the citizens of Delaware "to

take up no Warrants, and to accept of no Patents or Deeds whatever, from John Penn the Younger and John Penn, or either of them, or their Agents or Attornies." A statute of February 2, 1793, visits the penalty of a fine on inhabitants refusing to abide by these recommendations and accepting any grants of vacant or uncultivated lands except from persons acting under the authority of the state. Another statute (February 7, 1794) recites in an elaborate preamble that "the right to the soil and lands within the known and established limits of this state, was heretofore claimed by the crown of Great Britain," that by the treaty of peace between his Britannic Majesty and the United States of America, his Majesty "relinquished all rights, proprietary and territorial within the limits of the said United States, to the citizens of the same, for their sole use and benefit; by virtue whereof the soil and lands within the limits of this state became the right and property of the citizens thereof," and that "the claims of the late and former pretended proprietaries of this state, to the soil and lands contained within the same, are not founded either in law or in equity."

We do not yield assent to the contention that the effect of these acts was to establish a new boundary between Delaware and New Jersey either as the result of estoppel or through practical construction. There is no element of estoppel. The declarations in respect of title were not addressed to New Jersey, nor did action follow on the faith of them. There is not even a sufficient basis for a claim of practical construction. The declarations were framed *alio intuitu*, with an eye to private titles, not to public boundaries. In the economic unrest and disturbance of the day, the inhabitants of Delaware were ready to disavow the claims of the Penns and others to the ownership of vast areas of uncultivated land. This is far from meaning that there was a disavowal of the grants whereby the colony of Delaware had derived its form and being. What the legislation had in view was enlargement, not restriction, of the domain of common ownership. The truth, indeed, is that for the purpose of an inquiry into the boundaries between colonies or states, questions of private ownership are of secondary importance. The Penns' title may have been misjudged, or may even have failed for reasons not now apparent, and yet it does not follow that the boundaries of New Jersey had thereby been enlarged or those of Delaware curtailed. Such a result could not be wrought without successfully impeaching the letters patent of 1683 whereby a seigniorship in the new world was conveyed by Charles to James. The effect of those letters was to define the territorial limits of the province or colony of Delaware, whether Penn and his successors took anything thereby or not. The colony of Delaware as defined by this patent was the one that declared its independence in 1776 and that succeeded in 1783 to any fragment of ownership abiding in the Crown. In resuming the title to uncultivated lands, its people had no thought of modifying the ancient boundaries, of relinquishing a foot of soil above the waters or below. The later history of the controversy between the states makes this abundantly clear, if it could other-

wise be doubtful. What concerns us now is more than a question of *meum* and *tuum* between one man and another. Our concern is with the meaning of an instrument of government, a patent of jurisdiction, which was to generate a state.

The letters patent of March, 1683, being basic to the defendant's title, there must be another word of reference to the contention for the complainant that the letters were surrendered in April, 1683, a month after they were granted. The Special Master, as we have already stated, has made a finding to the contrary, and has summarized the evidence. There would be no profit now in repeating the analysis. Not only does the Master find that there was no surrender of the patent, he finds that the original patent is in evidence before him. His holding that there was no surrender is in line with Lord Hardwicke's judgment in *Penn v. Lord Baltimore*. His holding that the original letters are extant and in the custody of Delaware is in line with the judgment of the arbitrator, rendered eighty-five years ago, in the case of *Pea Patch Island, supra*. We see no adequate reason for rejecting his conclusion.

Assuming the existence of the patent New Jersey makes the claim that in its application to the river bed it is void upon its face in that the Crown was without power to grant away the soil beneath navigable waters. The objection will not hold. The letters patent to the Duke of York and the grant from York to Penn were not for private uses solely, but for purposes of government. There is high authority for the view that power was in the Crown by virtue of the *jus privatum* to convey the soil beneath the waters for uses merely private, but subject always to the *jus publicum*, the right to navigate and fish. *Commonwealth v. Alger*, 7 Ctrsh. 53; *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, 76; *People v. Steeplechase Park Co.*, 218 N. Y. 459, 473; *Shively v. Bowlby*, 152 U. S. 1, 13; Hale, *De Jure Maris*, p. 22. Never has it been doubted that the grant will be upheld where the soil has been conveyed as an incident to the grant or delegation of powers strictly governmental. *Martin v. Waddell*, 16 Pet. 367, 410, 413; *Massachusetts v. New York*, 271 U. S. 65, 89, 90. In such circumstances, "the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." *Martin v. Waddell, supra*, p. 413. The grant from Charles II to York was upon its face an instrument of government. The feoffments from York to Penn were in furtherance of kindred ends. Penn had no thought of using his title to the soil as an obstruction to navigation or to any other common right. In a letter to one of his commissioners he writes as early as April, 1682, concerning boundary negotiations with the Province of New Jersey: "Insist upon my Title to ye River, Soyl and Islands thereof according to Grant. . . . Whatever bee ye Argument, they are bounded Westward by the River Delaware, yn they cannot go beyond

low water mark for land. They have ye Liberty of ye River, but not ye Propriety." The title to the soil, which was subject to the *jus publicum* while it was vested in the King and his grantees, is subject to the same restrictions in the ownership of Delaware. The patent and the deeds under it are not void for want of power.

Delaware's chain of title has now been followed from the feoffment of 1682 to the early days of statehood, and has been found to be unbroken. The question remains whether some other and better chain can be brought forward by New Jersey. Unless this can be done, Delaware must prevail. But down to the Peace of 1783 at the end of the Revolution, New Jersey has no chain to offer. Up to that time, if not afterwards, her reliance is less upon the strength of her own title than on the weakness of her adversary's. The supposed defects have already been reviewed in this opinion, and have been found to be unreal. There is still to be considered whether events during the years of statehood have worked a change of ownership. New Jersey argues that they have, though not even during those years does she build her claim of title upon instruments of record. Her claim is rather this, that through the exercise of dominion by riparian proprietors and by the officers of government, title to the subaqueous soil up to the centre of the channel has been developed by prescription. The Special Master held otherwise, and we are in accord with his conclusion.

The acts of dominion by riparian proprietors are connected with the building of wharves and piers that project into the stream. The structures were built and maintained without protest on the part of Delaware, and no doubt with her approval. There is nothing in their presence to indicate an abandonment by the sovereign of title to the soil. By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state. *Yates v. Milwaukee*, 10 Wall. 497; *Scranton v. Wheeler*, 179 U. S. 141, 157, 158; *Shively v. Bowlby*, *supra*, at pp. 24, 55; *Town of Brookhaven v. Smith*, 188 N. Y. 74; *United States v. Dern*, 289 U. S. 352, 357. New Jersey in particular has been liberal in according such a license (*State v. Jersey City*, 25 N. J. Law 525), and so, it seems, has Delaware (*Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435; *State v. Reybold*, 5 Harr. 484, 486), though in Delaware, unlike New Jersey, title to the foreshore is in the riparian proprietor. From acquiescence in these improvements of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession.

Apart from these acts of dominion by riparian proprietors, there are other acts of dominion by New Jersey and its agents which are relied upon now as

indicative of ownership. They include the service of process, civil and criminal; the assessment of improvements for the purpose of taxation;<sup>4</sup> and the execution of deeds of conveyance to the United States and others. Of all it is enough to say that they are matched by many other acts, equally indicative of ownership and dominion, by the Government of Delaware. The Master summarizes the situation with the statement that "at no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey, thereto, except as modified by the . . . Compact of 1905."

The truth indeed is that almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain. *Vermont v. New Hampshire*, 239 U. S. 593, 613; *Indiana v. Kentucky*, 136 U. S. 479, 509, 511; *Massachusetts v. New York*, *supra*, p. 95. Acquiescence is not compatible with a century of conflict. Only a few instances will be mentioned among many that are available. In 1813, the Delaware Assembly ceded to the United States an island in the Delaware River, east of the main channel and within the twelve mile circle, for the erection of a fort. A controversy arose between the United States as holder of the Delaware title and Henry Gale who claimed under New Jersey. In 1836, Gale brought ejectment in the United States Circuit Court against Beling, a tenant. Mr. Justice Baldwin charged the jury that Penn had no title, but the charge makes it plain that he had no knowledge of the letters patent of 1683, and that they were not in evidence before him. Later an arbitration was agreed upon between Humphrey, who had succeeded to the New Jersey title, and the Government of the United States, represented by the Secretary of War. In that proceeding the award was in favor of the Government. The opinion by the arbitrator, which was announced in January, 1849, is a careful and able statement of the conflicting claims of right. See the case of *Pea Patch Island*, *supra*. But the controversy would not down. In 1877, New Jersey began a suit in this court to establish the disputed boundary. It slumbered for many years, and finally in April, 1907, was discontinued without prejudice. 205 U. S. 550. If a record such as this makes out a title by acquiescence, one is somewhat at a loss to know how protest would be shown.

The complainant builds another argument upon a compact with the defendant which was ratified by the parties in March, 1905, and approved by Congress in January of that year. 34 Stat. c. 394, p. 858. We are told that

<sup>4</sup> The complainant points for illustration to the construction of important works for the use of the Dupont Co. 4,400 feet below low water level, and taxation of these works like other property in New Jersey. At that time controversy was flagrant between the two states. No inference of ownership can be drawn from dominion exerted in such conditions.

by this compact the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go. "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

This opinion, though it has summarized many facts and arguments, has perforce omitted many others, important in the view of counsel. We content ourselves with the statement that they have not been overlooked. Omission is the less serious in view of the able and comprehensive report submitted by the Special Master. All that matters most in this keen but amicable controversy is there set forth at large, and there and in the supporting documents the student of our local history can live it over when he will.

We uphold the title of Delaware to the land within the circle.

*Second. The boundary below the circle in the lower river and the bay.*

Below the twelve mile circle there is a stretch of water about five miles long, not different in its physical characteristics from the river above, and below this is another stretch of water forty-five miles long where the river broadens into a bay.

The title to the soil of the lower river and the bay is unaffected by any grant to the Duke of York or others. The letters patent to James do not affect the ownership of the bed below the circle. Up to the time when New Jersey and Delaware became independent states, the title to the soil under the waters below the circle was still in the Crown of England. When independence was achieved, the precepts to be obeyed in the division of the waters were those of international law. *Handly's Lessee v. Anthony*, 5 Wheat. 374, 379.

International law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical centre, half-way between the banks. *Iowa v. Illinois*, 147 U. S. 1, 7, 8, 9; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 631; *Louisiana v. Mississippi*, 202 U. S. 1, 49; *Arkansas v. Tennessee*, 246 U. S. 158, 169, 170; *Arkansas v. Mississippi*, 250 U. S. 39; *Minnesota v. Wisconsin*, 252 U. S. 273, 282. It applies the same doctrine, now known as the doctrine of the *Thalweg*, to estuaries and bays in which the dominant sailing channel can be followed to the sea. *Louisiana v. Mississippi*, *supra*; and compare 1 Halleck *International Law*, 4th ed., p. 182; Moore, *Digest International Law*, Vol. 1, p. 617; *Matter of Devoe Manufacturing Co.*, 103 U. S. 401; *The Fame*, 8 Fed. Cas. 984, Story, J.; *The Open Boat*, 18 Fed. Cas. 751, Ware, J. The *Thalweg*, or down-way, is the track taken by boats in their course down the stream, which is that of the strongest current. 1 Westlake, *International Law*, p. 144; Orban, *Etude de Droit Fluvial International*, p. 343; Kaeckenbeck, *International*

*Rivers*, p. 176; Hyde, *supra*; Fiore, *International Law Codified*, § 1051; Calvo, *Dictionnaire de Droit International*. Delaware makes no denial that this is the decisive test whenever the physical conditions define the track of navigation. Her position comes to this, that the bay is equally navigable in all directions, or at all events was so navigable in 1783, and that in the absence of a track of navigation the geographical centre becomes the boundary, not of choice, but of necessity. As to the section of the river between the bay and the circle, the same boundary is to be accepted, we are told, as a matter of convenience.

The findings of the Special Master, well supported by the evidence, overcome the argument thus drawn from physical conditions. He finds that "as early as Fisher's Chart of Delaware Bay (1756) there has been a well-defined channel of navigation up and down the Bay and River," in which the current of water attains its maximum velocity; that "Delaware River and Bay, on account of shoals, are not equally navigable in all directions, but the main ship channel must be adhered to for safety in navigation"; that the Bay, according to the testimony, "is only an expansion of the lower part of the Delaware River," and that the fresh water of the river does not spread out uniformly when it drains into the bay, but maintains a continuing identity through its course into the ocean. "The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel."

The underlying rationale of the doctrine of the *Thalweg* is one of equality and justice. "A river," in the words of Holmes, J. (*New Jersey v. New York*, 283 U. S. 336, 342) "is more than an amenity, it is a treasure." If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other. Considerations such as these have less importance for commonwealths or states united under a general government than for states wholly independent. Per Field, J. in *Iowa v. Illinois*, *supra*, p. 10. None the less, the same test will be applied in the absence of usage or convention pointing to another. *Iowa v. Illinois*, *supra*. Indeed, in 1783, the equal opportunity for use that was derived from equal ownership may have had a practical importance for the newly liberated colonies, still loosely knit together, such as it would not have today. They were not taking any chances in affairs of vital moment. Bays and rivers are more than geometrical divisions. They are the arteries of trade and travel.

The commentators tell us of times when the doctrine of the *Thalweg* was still unknown or undeveloped. Anciently, we are informed, there was a principle of co-dominion by which boundary streams to their entire width were held in common ownership by the proprietors on either side. 1 Hyde, *International Law*, p. 243, § 137. Then, with Grotius and Vattel, came the notion of equality of division (Nys, *Droit International*, Vol. 1, pp. 425, 426; Hyde, *supra*, p. 244, citing Grotius, *De Jure Belli ac Pacis*, and Vattel,

*Law of Nations*), though how this was to be attained was still indefinite and uncertain, as the citations from Grotius and Vattel show.<sup>5</sup> Finally, about the end of the eighteenth century, the formula acquired precision, the middle of the "stream" becoming the middle of the "channel." There are statements by the commentators that the term *Thalweg* is to be traced to the Congress of Rastadt in 1797 (Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, p. 72; Koch, *Histoire des Traités de Paix*, Vol. 5, p. 156), and the Treaty of Lunéville in 1801. Hyde, *supra*, pp. 245, 246; Kaackenbeck, *International Rivers*, p. 176; Adami, *National Frontiers*, translated by Behrens, p. 17. If the term was then new, the notion of equality was not. There are treaties before the Peace of Lunéville in which the boundary is described as the middle of the channel, though, it seems, without thought that in this there was an innovation, or that the meaning would have been different if the boundary had been declared to follow the middle of the stream. Hyde, *supra*, p. 246. Thus, in the Treaty of October 27, 1795, between the United States and Spain (Article IV), it is "agreed that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the River Mississippi." Miller, *Treaties and other International Acts of the United States of America*, vol. 2, p. 321.<sup>6</sup> There are other treaties of the same period in which the boundary is described as the middle of the river without further definition, yet this court has held that the phrase was intended to be equivalent to the middle of the channel. *Iowa v. Illinois*, *Arkansas v. Tennessee*, *Arkansas v. Mississippi*, *supra*. See, *e. g.*, the Treaty of 1763 between Great Britain, France and Spain, which calls for "a line drawn along the middle of the River Mississippi." The truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid. There was still a margin of uncertainty within

<sup>5</sup> Grotius has this to say (*De Jure Belli ac Pacis*, Book 2, c. 3, § 18): "In Case of any Doubt, the Jurisdictions on each Side reach to the Middle of the River that runs betwixt them, yet it may be, and in some Places it has actually happened, that the River wholly belongs to one Party; either because the other Nation had not got possession of the other Bank, 'till later, and when their Neighbours were already in Possession of the whole River, or else because Matters were stipulated by some Treaty."

In an earlier section (§ 16, subdivision 2) he quotes a statement of Tacitus that at a certain point "the Rhine began . . . to have a fixed Channel, which was proper to serve for a Boundary."

Vattel (*Law of Nations, supra*) states the rule as follows: "If, of two nations inhabiting the opposite banks of the river, neither party can prove that they themselves, or those whose rights they inherit, were the first settlers in those tracts, it is to be supposed that both nations came there at the same time, since neither of them can give any reason for claiming the preference; and in this case the dominion of each will extend to the middle of the river."

<sup>6</sup> See also the treaties collected in the Argument of the United States before the International Boundary Commission in the Chamizal Arbitration of 1910 between the United States and Mexico.

Nys traces the concept of the *Thalweg* to a period earlier than the Treaty of Munster, 1648. *Droit International*, v. 1, p. 426.

which conflicting methods of division were contending for the mastery. Conceivably that is true today in unusual situations of avulsion or erosion. Hyde, *supra*, pp. 246, 247. Even so, there has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. Unless prescription or convention has intrenched another rule (1 Westlake, *International Law*, p. 146), we are to utilize the formula that will make equality prevail.

In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give to the boundary in bay and river below the circle a practical location, or to establish a prescriptive right. In these circumstances, the capacity of the law to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the *Thalweg* had only a germinal existence. The gap is not so great that adjudication may not fill it. Lauterpacht, *The Function of Law in the International Community*, pp. 52, 60, 70, 85, 100, 110, 111, 255, 404, 432. Treaties almost contemporaneous, which were to be followed by a host of others, were declaratory of a principle that was making its way into the legal order. Hall, *International Law*, 7th ed., p. 7. International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attest sits jural quality. Lauterpacht, *supra*, pp. 110, 255; Hall, *supra*, pp. 7, 12, 15, 16; Jenks, *The New Jurisprudence*, pp. 11, 12. "The gradual consolidation of opinions and habits" (Vinogradoff, *Custom and Right*, p. 21) has been doing its quiet work.<sup>7</sup>

It is thus with the formula of the *Thalweg* in its application to the division between Delaware and New Jersey. We apply it to that boundary, which goes back to the Peace of Paris, just as we applied it to the boundary between Illinois and Iowa, which derives from a treaty of 1763 (*Iowa v. Illinois*, *Keokuk & Hamilton Bridge Co. v. Illinois*, *Arkansas v. Tennessee*, *Arkansas v. Mississippi*, *supra*), or to that between Louisiana and Mississippi (202

<sup>7</sup> "International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles. . . . This is the method of jurisprudence; it is the method by which law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals." The case of the Eastern Extension Australasia and China Telegraph Co., Ltd., decided November 9, 1923, by the British American Arbitral Tribunal under the Convention of August 18, 1910, Nielsen's Report, pp. 75, 76, quoted by Lauterpacht, *supra*, p. 110.

U. S. 1, 16), which goes back to 1812, or between Minnesota and Wisconsin (252 U. S. 273), going back to 1846. Indeed, counsel for Delaware make no point that the result is to be affected by difference of time. In requests submitted to the Master they have asked for a finding that "there was in 1783 no well defined channel in the Delaware Bay constituting a necessary track of navigation and the boundary line between the States of Delaware and New Jersey in said bay is the geographical center thereof." The second branch of the request is dependent on the first. This is clear enough upon its face, but is made doubly clear by the exceptions to the report and by the written and oral arguments. The line of division is to be the centre of the main channel unless the physical conditions are of such a nature that a channel is unknown.

We have seen that even in the bay the physical conditions are consistent with a track of navigation, which is also the course of safety. Counsel do not argue that such a track is unknown in the five miles of river between the bay and the circle. The argument is, however, that the geographical centre is to be made the boundary in the river as a matter of convenience, since otherwise there will be need for a sharp and sudden turn when the river meets the bay. Inconvenient such a boundary would unquestionably be, but the inconvenience is a reason for following the *Thalweg* consistently through the river and the bay alike instead of abandoning it along a course where it can be followed without trouble. If the boundary be taken to be the geographical centre, the result will be a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. *Minnesota v. Wisconsin, supra*. If the boundary be taken to be the *Thalweg*, it will follow the course furrowed by the vessels of the world.

The report will be confirmed, and a decree entered accordingly, which, unless agreed to by the parties, may be settled upon notice.

Within the twelve mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905.

Below the twelve mile circle, the true boundary between the complainant and the defendant will be adjudged to be the middle of the main ship channel in Delaware River and Bay.

The costs of the suit will be equally divided.

*It is so ordered.*

## BOOK REVIEWS AND NOTES \*

*Académie de Droit International, Recueil des Cours, 1933.* Paris: Recueil Sirey, 1933-1934. 4 vols. Index.

These four volumes, being Nos. 43, 44, 45 and 46 of the whole collection, contain the lectures delivered at the Hague Academy of International Law at its eleventh session, in 1933. They include 26 courses aggregating 147 lectures. The lecturers represented 14 countries, Italy furnishing four lecturers, England and France three each, Poland, Russia, Germany, Czechoslovakia and the United States two each, and Norway, Spain, Syria, Yugoslavia, Turkey and Switzerland one each. For the first time the sessions were held in the new wing of the Peace Palace especially constructed for the use of the Academy. The number of auditors attending the lectures totalled 346, representing 27 nationalities, Germany furnishing, next to the Netherlands (180), the largest number (44), the United States following with 23. Ninety-three of the registered auditors were women.

As in former years, the subjects of the lectures ranged over a wide field: public and private international law, municipal law, international organization and administration, international relations, international finance and economics and even journalism, sociology and psychology. The recently adopted practice of providing a general course of 16 lectures on the international law of pacific relations was followed, Professor Georges Scelle being chosen to give that course for 1933. His lectures, filling 282 pages of Volume IV, deal with the elements of the international juridical order, the constitutional technique of international law, custom, treaties, arbitration, judicial settlement of international disputes, and the rôles of the judiciary and executive organs in the development and application of international law. His approach, he insists, was realistic and scientific, every postulate the proof of which could not be established experimentally being rejected. Of a somewhat similar scope and character were the lectures of M. Salvioli on "the general rules of peace" dealing with the nature and subjects of international law, the recognition of states and governments, international organs, the responsibility of states, methods for the settlement of international disputes, and other matters usually dealt with in a general treatise on international law.

Dealing with juridical conceptions and methods were the lectures of Professor Castberg on the methodology of international public law, in which he discussed the processes of juridical reasoning from the point of view of methodology and the theory of knowledge, as illustrated in the interpretation of

\* The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—ED.

treaties and in arriving at solutions where neither treaties nor customary law provide a solution. Falling within the field of international organization were the lectures of M. Rundstein on the Permanent Court of International Justice as a tribunal of appeal. He dwelt especially upon the defects of a system under which there is no appeal from an arbitral award, examined the proposals that have been made for conferring appellate jurisdiction on the Permanent Court, and discussed the advantages and disadvantages of making it a court of appeal. Apparently in sympathy with the general principle, he expressed the opinion that the reform should come slowly and by gradual stages, the appellate jurisdiction of the court at first being restricted to those cases only where there has been usurpation or excess of power on the part of the lower tribunal. He observed that "in the actual state of international relations, the Permanent Court is a necessary institution for the settlement of disputes of a juridical order; it is a light-house serving as a sure guide; but if we wish the court to remain a rock of bronze inaccessible to the play of political complications, it is necessary to avoid premature innovations."

Sir John Fischer Williams' lectures on the doctrine of recognition in international law and its recent developments constitute a valuable contribution to a subject of great present-day interest. He reviewed the development of the doctrine from ancient times, discussed the legal effects of recognition and of non-recognition, emphasized that recognition has no creative effect but is only the affirmation of a relation between the recognizing government and the government recognized, analyzed the Wilson, Estrada and Stimson doctrines, and considered the question as to what extent the withholding of recognition can be effectively employed as a sanction for enforcing the observance of international law and the performance of treaty engagements.

Mention might be made here of the lectures of Professor McNair on the application and interpretation of international treaties according to British jurisprudence, in which he reviewed and evaluated the decisions of the English courts on questions involving the relation of treaties to municipal law, the rôle of Parliament in the making and enforcement of treaties, the termination of treaties, the date when they come into force, ratification, interpretation, etc.

M. Udina discussed the subject of state succession, emphasizing its importance in these days of frequent change in the territorial and political organization of states, and explained the rules and reviewed the practice regarding the transmissibility of rights and obligations when a state undergoes change in its juridical personality. He recognizes that certain rights and obligations do pass by succession but that others do not.

Falling in somewhat the same field were the lectures of Miss Reid on international servitudes, the importance of which she thinks has been somewhat overlooked in the literature of international law. She distinguishes between the different kinds of servitudes, gives various examples in illustration, discusses the essential elements which constitute a servitude, and con-

siders the question whether the existence of a servitude carries with it a derogation from the sovereignty of the servient state, her conclusion being that it does not.

In this connection may be mentioned the lectures of M. Winiarski on international fluvial law, in which he discussed the freedom of river navigation and the limitations thereupon, the problem of insuring equality of right, the maintenance of the public works necessary when navigation is open to the vessels of non-riparian states, and the administration of the rules of navigation. Here also reference may be made to the lectures of Professor Charles E. Hill on the international régime of maritime straits, in which the international status of the more important straits of the world is discussed in the light of the conventions by which they are regulated.

Nationality and the rights of aliens were the subject of two courses; one by M. Vichniac on the international status of *apatrides*, and one by M. Rechid on the condition of foreigners in the Republic of Turkey. The former points out that since the World War the number of stateless persons in the world has greatly multiplied, and he describes their somewhat lamentable condition, dwells upon the causes which have brought about this situation, and reviews the efforts that have been made to ameliorate their unfortunate condition, and especially the activities of the League of Nations in their behalf. M. Rechid contrasts the lot of aliens in Turkey today with their situation under the ancient law of the Ottoman Empire. Their rights, public and private, are set forth and with them a list of the professions and occupations which still remain unopen to them—a list, it must be admitted, which is of considerable length.

In the field of private international law may be mentioned the lectures of Professor Gutteridge on the conflict of the laws of judicial competence in personal actions, in which he compares the differing rules of the more important legal systems of the world; those of M. Straznicky on the various conferences of private international law that have been held since the World War, in which he evaluates the work of those conferences from the point of view of their achievements; and of M. Rühlmann on the problem of moral persons in private international law, in which he discusses the rôle of the corporation in modern life, its legal nature, the different forms which it takes, the rules for determining their nationality, and similar matters.

In this connection mention may also be made of the lectures of M. Ripert on the rules of civil law applicable to international relations. Taking as his starting point the clause of Article 38 of the Statute of the Permanent Court which charges the court with the duty of applying the "general principles of law recognized by civilized nations," he undertakes to determine what those principles are. They are, he concludes, to be found in the positive legislation of states and include such rules as those relative to the obligation of contracts, civil responsibility, the exercise of rights and the rules of evidence and interpretation. Here also might be mentioned the lectures of M. Armin-

jon on the notion of vested rights (*droits acquis*) in international law—a notion, he says, which lacks consistency, and which is ambiguous and polymorphous. He examines in turn some of the dominant theories, such as those of the Anglo-Saxon school of jurists and of the Continental school, and especially those of Beale, Lorenzen and Pillet, none of which he considers as being entirely satisfactory.

In the field of economics and finance may be mentioned the lectures of Herr Nussbaum on the gold clause in international contracts. He considers in turn the nature of the clause, its different types, its employment in practice in Germany and other countries, the grounds upon which it has been attacked, the decisions of the courts on the validity of the clause, including the cases of the Brazilian and Serbian Loans decided by the Permanent Court of International Justice, and the practical difficulties in the way of the execution of the clause. Considering the advantages and disadvantages of the clause, he appears to feel considerable doubt as to whether, regarded from the economic point of view, it is a desirable provision in an international contract.

Two courses of lectures dealing with writers on international law and their contributions to the development of the law, were those of M. Barcia Trelles on Suarez, his doctrines, his writings and his influence; and of M. Catellani on the masters of the Italian school of international law in the 19th century, in which a similar evaluation was made of a group of Italian scholars including Fusinato, Buzzati, Mancini, Rocco, Fiore, and others.

Other lectures which for lack of space can only be referred to here were those of M. Cardah on the French mandate over Syria, which analyzed the French administration and commended it particularly for its achievements in behalf of education and the administration of justice; of M. Zimmermann, on the crisis of international organization at the end of the middle ages; of M. Vitta on the international defense of individual liberty and morality, in which the lecturer reviewed the progress of the efforts of the League of Nations, especially, to suppress slavery, the slave trade and the traffic in women, children and obscene publications; of M. Mirkine-Guetzévitch on constitutional law and the organization of peace, in which he dwelt especially on the ways by which constitutional law is capable of contributing to the advancement of the cause of international peace; and of Mr. Schindler on the social and psychological factors of international law, in which he distinguishes between the statics and dynamics of international law and points out the rôle which public opinion plays in the determination of foreign policy and the development of international law.

Finally, mention must be made of the very interesting lectures of M. Butter on the press and international political relations. Although falling quite outside the domain of international law, they deal with a force which plays an important part in international relations and even in the development of international law. He considers in turn such matters as the influence of the press on the foreign policies of states, its use by governments and statesmen,

its rôle during the World War as a means of influencing public opinion, the organization of the propaganda service in various countries during that war, and the responsibility of the press in international relations.

JAMES W. GARNER

*Sicherheit und Gerechtigkeit. Eine gemeinverständliche Einführung in die Hauptprobleme der Völkerrechtspolitik.* By Fritz Berber. Berlin: Carl Heymann's Verlag, 1934. pp. viii, 165, Rm. 8.

This little study, intended for circles interested in foreign affairs, starts from the proposition, which is undoubtedly true, that international law is in the post-war world a principal weapon and instrument in the international diplomatic struggle. The politics of international law (science of legislation) is, therefore, today in the very center of the science of international law. The author contrasts the "old" international law, satisfied with regulating, so to speak, minor affairs between nations, with the "new" international law, determined to take a "totalitarian" view, attempting to regulate the most central and highly political relations between nations. But the author disagrees completely with what has been tried in the years since 1920. In his emphasis upon the dynamic character of international law, as contrasted to the purely static character of the French conception, he is certainly right; but this writer cannot accept the deductions made by the author.

This study not only reflects the dominating political issue of Europe—status quo *v.* revision, French security *v.* German equality—but it is also an expression of a typically National Socialist conception of international law, just as Korovine has given us a Bolshevist conception. The author regards all attempts to "formalize world history by transforming it into international law," to "transform international politics into a court procedure," completely to rationalize the vital, irrational, mystic powers at work in international politics, as attempts doomed to failure from the beginning. Not security, but justice. He is against any form of super-State, against any penal conception, against any system of sanctions by force, against the League of Nations, against the cumbersome procedure of great international conferences, against wide, vague, multilateral pacts. The national sovereign State is his basis; justice demands first of all, respect of national honor and full equality. The only effective sanction of international law, according to the author, is the free consent of free and equal States on the basis of justice. International law, the author believes, will always play only a very modest part in international politics; nevertheless, a great field is open to it in trying to materialize justice in the concreteness of political reality. The best means to achieve that end are direct diplomatic negotiations on precise and concrete matters, made between the directly interested States on the basis of full equality and justice, freely consented to; as a model he gives the German-Polish Treaty of Friendship of 1934.

JOSEF L. KUNZ

*Between Two Worlds. Interpretations of the Age in Which We Live.* Essays and Addresses. By Nicholas Murray Butler. New York and London: Charles Scribner's Sons, 1934. pp. xvi, 450. Index. \$3.00.

The author apparently chose his title in order to express the thought of a passing world, a world of Liberty, which may be replaced by another world with all its menace, a world of Compulsion in some of its many forms. The world of Liberty may yet be saved, but if so, it will be by Youth, "but only if it be an instructed, an educated, a reflective Youth" (p. xv). Matthew Arnold has expressed the thought in these words: "Wandering between two worlds, one dead, the other powerless to be born."

In his endeavor to appreciate and describe the true nature of the crisis, Dr. Butler has given us a selection of his writings covering a wide field within the range of the historian, the political philosopher, the economist and the student of international policy. It is the latter phase which here interests us. Many of the essays converge on the thought that the World War should finally be brought to an end, the question of the war debts settled and economic nationalism surrendered. In an address delivered before the American Club of Paris, a striking contrast is drawn between the situation of the young American Republic in 1792, with a mass of debt owing by it to Europe, and that of the great creditor nation of 1932 with the situation reversed. Jefferson is quoted with telling effect and the lesson drawn that if trade and commerce are rendered impossible by trade barriers and at the same time insistence made upon payment, "with the world's gold piled up in two heaps, one on each side of the ocean," the public must be prepared to pay the bill for whatever may be destroyed (p. 138).

The cumbersome nature of our treaty-making procedure under the Constitution is blamed for much of the confusion of our foreign policy. Dr. Butler was originally a strong believer in having the United States join the League, but has now reached the conclusion that if we had joined it, we should have ruined it before this; not intentionally, but because every conclusion might have to be debated before the Senate for a year, with consequent disturbance to the whole world (p. 149).

The book presents issues of the day in a thought-provoking manner and should be widely read by those who believe that national problems must be solved by a sympathetic understanding of international economics and politics. To the confirmed isolationist, the author's warnings of pitfalls and dangers to come, will be as a voice crying in the wilderness.

ARTHUR K. KUHN

*European Treaties bearing on the History of the United States and Its Dependencies.* Edited by Frances Gardner Davenport. Vol. III, 1698-1715. Washington: Carnegie Institution, 1934. pp. vi, 269. Index.

This volume completes the publication of Miss Davenport's collection of treaties relating to American history, the first volume of which appeared in

1917 (reviewed in this JOURNAL, Vol. 13, p. 148), and the second in 1930 (reviewed in this JOURNAL, Vol. 24, p. 639). In fact, at the time of her death, Miss Davenport had not completed the bibliographies and introductions to the last six documents here printed. These texts were prepared by the general editor, Dr. J. Franklin Jameson, but Miss Davenport's last introductions, those to the British preliminary treaty of peace with Spain (1713) and the British treaties of peace and of commerce with France (1713), give the reader the major diplomatic materials concerning these final treaties concluding the War of the Spanish Succession. In this volume, as in the preceding one, all documents are given in the original language, and unless in English or French, an English translation is also provided.

One cannot read the introductions to these documents without being impressed by Miss Davenport's scholarship and erudition. All documentary and unofficial materials, contemporary and subsequent, have been combed for information upon the intentions underlying the articles of these treaties and the alternatives which were considered. One sees here war and alliance as the main instruments of national policy, while the main objectives of the national policies of France and England, the principal protagonists in the drama covered by this book, are, on the one hand, the augmentation of territory and diplomatic power, and, on the other, the maintenance of the balance of power on the continent and the increase of commercial opportunity and dominion overseas.

The fact that the primary interest of the collection is in American history might have led to an exaggeration of the significance of American territory and trade in the diplomatic game. Miss Davenport, however, has been careful to present in her introductions the total situation as envisaged by the parties to each negotiation, thus keeping the American angle in its proper perspective.

These three volumes together cover the diplomacy affecting America from 1455 to 1715. They afford the student a rich mine of documents, classified bibliographies and scholarly commentary the use of which cannot but throw important light upon the influence which the opening of a vast new world had upon the spirit of European civilization and upon the characteristics of world politics in the modern state system. The reasons for the foreign policy which the United States adopted after independence are also illuminated.

It is to be hoped that the Carnegie Institution can find a scholar to continue the series up to the American Revolution, when Hunter Miller's collection of treaties of the United States takes up the task.

QUINCY WRIGHT

*Grönlands Retsstilling i Middelaaderen, fire Artikler.* By Jón Dúason. Copenhagen: Prentsmidja B. L. Jensen, 1934. pp. 164.

In 1930 the Icelandic jurist, Dr. Jón Dúason, published his doctor's dissertation in Oslo on Greenland's position in constitutional law. From several

quarters the views of the author met with opposition. Dr. Dúason replied to his adversaries, and has now published his four essays in the present volume. His answers, point by point and in full, support and confirm his thesis that Greenland in the Middle Ages was a part of the Icelandic State.

Greenland is situated within the farthest range of sight of Iceland and, according to mediaeval Icelandic law, Iceland therefore had a permanent right of supremacy and possession of the country, which up to that time had had no owner. Before its colonization, Greenland was Icelandic common land and therefore its subsequent colonization was *de jure* internal. Greenland was explored by Icelanders, and no other nation took part in the exploration. Eirik Raude (Eric the Red), whom Professor Bull thinks was a Norwegian, was the son of an Icelandic "landnamsman" and had Icelandic citizenship. It was he who was the leader of the Icelandic expedition to Greenland in 985, and in the following year there was a colonization by some Icelandic citizens.

The old Icelandic State ("vár lög," our law, as Dr. Dúason calls it) was organized in such a way that the citizens were representatives of the state. Jurisdiction and police powers were exercised by them, and when they established themselves in Greenland, the Icelandic colonists constantly exercised their police powers and jurisdiction according to the law and the government of Iceland. Iceland's occupation of Greenland met with no protest. Greenland became an Icelandic possession. The law, the social order and the executive power of the Icelandic State were in force in that country, and, as a part of Iceland, Greenland followed that country when it acknowledged King Haakon as their ruler and became a monarchy in union with Norway.

When the dispute between Denmark and Norway about Greenland in 1931 was brought before the Permanent Court of The Hague, whose judicial decision was in favor of Denmark, the Icelandic Government, while the proceedings were going on, considered whether it should make a reservation to possible Icelandic pretensions of the future. Such a *démarche* was made in 1931 by the Icelandic Prime Minister but was not later followed up.

Dr. Dúason's works on Greenland treat of a juridical question hitherto hardly written about. They have helped to make the position clear and have drawn the attention of the science of law to this question important from the point of view of both constitutional and international law.

RAGNAR LUNDBORG

*The Strategy of Raw Materials.* By Brooks Emeny. New York: The Macmillan Co., 1934. pp. xvi, 202. Index. \$3.00.

Those who wish to calculate the outcome of another struggle between great Powers will occupy themselves less with the man-power and equipment that represent the first throw in the game of war than with the agricultural and industrial resources which will finally prove determining. Food sup-

plies may be taken for granted, since every one of the seven great Powers, except England, can feed herself from her own soil, though not without privations. Industrial technique may also be taken for granted. The United States, England and Germany have indeed more efficient managers and workers in the heavy industries than France, Italy, Japan and Russia. But in time of war, when costs are ignored, the less efficient industrial nations will manage to make the munitions and arms they require, provided they have the materials. They must have coal and iron, petroleum, rubber, nitrates and sulphuric acid, together with a very considerable number of materials that bulk less heavily but are yet indispensable.

Brooks Emeny has undertaken to assemble the facts on the relative position of the seven great Powers with respect to the supply of the materials essential to effective war-making. The subject is naturally approached from the American angle. Of the 26 materials of strategic importance, how many are insufficiently supplied from within our own borders? Of those of which we have too little, what supplies are accessible in contiguous territory, like Canada and Mexico, or from regions within our zone, from which no practicable blockade could cut us off?

Taken by and large, our raw material position, like our geographical position, is incomparably stronger than that of any other of the great Powers. The British Empire as a whole is equally well supplied, but the lines of communication between England and her colonies are always in danger of interruption. Russia is most nearly comparable to the United States in wealth of resources within her own boundaries, but Russia is easily cut off from sea-borne supplies, whereas no coalition of the Powers could blockade both coasts of America.

Our weakest points are the non-ferrous metals and rubber. We have to import most of our manganese, without which our iron industry would be paralyzed. We have to get it from Russia, India, Brazil or the Gold Coast. If we command the seas we need not worry about this, but these are long lines of transport. If we must be prepared for war, we probably ought to keep on hand two years' peace and war consumption. We depend on Rhodesia, Russia and Cuba for chromium. Much of our requirement could be produced at home if we would pay the price, but for all that a two years' stock pile would be reassuring. Our nickel comes from Canada and would come, war or no war. Tungsten comes mostly from China, but we could expand our own production to meet war requirements. Tin comes from the Malay States, Dutch East Indies and Bolivia. This material is not absolutely vital, but important. A little money invested in stocks would help us to escape the delusion that we have to maintain naval forces sufficient to defend long trade routes. Rubber we must bring from great distances, but we have enormous stocks for peacetime use which could be commandeered for war.

The author has equipped his book with a series of charts which reduce to simplicity the whole complex of the supply of strategic materials. Text and

charts together deserve the serious attention of everyone who is concerned about the military position of the United States. Defensively, it is an impregnable position. No statesman who knows his raw materials would dream of engineering an attack upon America.

ALVIN JOHNSON

*A Short History of International Affairs, 1920-1934.* By G. M. Gathorne-Hardy. New York: Oxford University Press; London: Humphrey Milford, 1934. pp. xiv, 351. Index. \$3.00.

Readers who have come to rely on the valuable *Survey of International Affairs* which Professor Toynbee annually edits, will welcome this supplementary volume, which the Royal Institute of International Affairs has issued. Were it merely a restatement of the events narrated in the yearly volumes, some justification for repetition would be necessary. But in this volume Mr. Gathorne-Hardy presents the events in a retrospect that acquires value because of its focus as well as compactness.

The character of the author inevitably becomes stamped upon his product and there is ample internal evidence to show that the author writes as a conservative Englishman and from a non-American point of view. In the part dealing with the Peace Settlement, President Wilson comes in for some castigation for many of those features which are popularly regarded here as the high water of idealism. The blame for certain decisions adverse to the conciliatory British proposals before the Reparations Commission is laid to the absence of American representation. However, apart from such expressions of opinion, criticism can be made of the author's disproportionate treatment of the foreign relations of the American continents, as found in Chapters XII and XIII. Contrast this with the rather close consideration of Chinese events, which could have been told more effectively with less detail.

The reliability of the facts presented hardly needs questioning, although one might well ask whether the answer that Canada and other Dominions gave at the time of the Chanak incident may be regarded as a response to the call (p. 114). Statistics which show that the share of the British Empire in the foreign trade of China during 1923 was the lowest in five years (1924-28), would hardly bear out the assertion that in 1926 the general foreign boycott in China "was actually enforced only against the Japanese" (p. 239).

However, such criticisms do not detract from the general place of the book, which may be regarded as a valuable contribution to the general literature on international affairs. Divided into three parts,—The Period of Settlement, 1920-1925; The Period of Fulfilment, 1925-1930; The Period of Crisis, 1930-1934,—these eventful years are presented in an enjoyable and manageable form that makes this volume a handy companion in any course on international relations.

LIONEL H. LAING

*Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik.* By Hans Kelsen. Leipzig and Vienna: F. Deuticke, 1934. pp. xv, 236. Index.

In this new volume, Hans Kelsen gives a short résumé of his "Pure Jurisprudence." "Pure Jurisprudence" means a science of law, purified from all elements of natural sciences as well as from all political ideology; it aims to bring the science of law, which hitherto has been nearly completely submerged in reasonings, directed, openly or under disguise, toward political postulates, to the level of a real science, occupied with the cognition, not the making of the law, and characterized, like every real science, by exactitude and objectivity. "Pure Jurisprudence," free from sociology and ethics (natural law), has the law and nothing but the law as its subject-matter. Questions as to how the law operates as a motivating force, or as to what the law should be, are alien to a "Pure Jurisprudence"; "Pure Jurisprudence" has an anti-ideological tendency. It deals with the law, not with justice. It aims at the cognition, not at the valuation of the law. It will not and cannot justify the law; in a word, it is science, not politics.

It is on this basis that Kelsen sums up his principal doctrines: the juridical order as a system of norms; the legal norm as a compulsory norm, regulating human behavior; combating the traditional dualisms—based on the *jus naturae*—of "right" and law, of public and private law; the cognition of the conception of the "person" in law; the normative character of the law; the central position of the conception of duty; the doctrines of "juridical imputation," of the "basic norm" and of the "pyramid of law"; the distinction between validity and efficiency of the law; the identity of law and State; the distinction between the static problem of the validity and the dynamic problems of the creation of the law.

And pure jurisprudence culminates in the theory of international law, its fundamental basis, its relations toward the municipal laws of the single States. The treaty law is today only particular law; all treaty law is based on the rule of the sanctity of treaties, a rule which belongs to general international law, which today still is customary law. International law is like every juridical order, a compulsory order, but yet a primitive juridical order, lacking the division of labor (special organs for the creation and the application of the law) of more highly organized legal communities. That international law obligates "the States," means that the rules of international law, which, like all legal rules, regulate and can regulate nothing but human behavior, are incomplete. They regulate only what shall or shall not be done, whereas they delegate to the States the function of determining the individuals (the "organs" of the State), who shall or shall not do so.

More strongly than ever Kelsen insists on the unity of municipal and international law, on a monistic conception, and within it, on the primacy of international law. This unity of the legal conception of the world shows the sovereign States—sovereign in a relative, not an absolute sense—as the organs of the international community.

Kelsen's text is followed (pp. 155-222) by a bibliography of the "Pure Jurisprudence," written by Dr. R. A. Métall. It is the first attempt of its kind and gives a list of the books and articles of Kelsen himself, of the other authors of the "Vienna School," as well as many writings, either of pronounced followers or stout opponents of this school, or of authors who have been influenced by it or have dedicated critical studies to it. This comprehensive, although, as Dr. Métall remarks, by no means complete bibliography, listing writings in nearly all languages, will be highly welcome to students of modern philosophy of law.

JOSEF L. KUNZ

*The Struggle for South Africa, 1875-1899.* By Reginald I. Lovell. New York: The Macmillan Co., 1934. pp. xviii, 438. Index. \$4.00.

This important publication of the Bureau of International Research of Harvard University and Radcliffe College carries on the story of the struggle between Briton and Boer so admirably begun by C. W. de Kiewiet in his *British Colonial Policy and the South African Republics, 1848-1872*, and then proceeds to deal with the struggle between England, Germany and Portugal for dominance in South Africa.

The chapters dealing with the internal history of South Africa and the British attempts at a confederation carry the complicated story from the annexation of the Transvaal in 1877 to the outbreak of the Second Boer War. The author breaks fresh ground, especially in fixing the responsibility for the Jameson Raid, and does good service in dissipating some of the emotional fog that has obscured South African events and personalities. Dr. Lovell follows the topical rather than the chronological method, and introduces a great number of personages into his narrative. The result is an accurate but somewhat confused picture. This defect is not found in the chapters dealing with Anglo-German and Anglo-Portuguese rivalry where the canvas is larger and the relatively few figures stand out more clearly.

The struggle between England and Germany in the west for Angra Pequena and in the east for St. Lucia Bay, with special reference to such events as the Heligoland treaty and the famous Krüger telegram, is well depicted. We see clearly the growth of economic imperialism in both countries, the attempt of the British in the Cape to set up a Monroe Doctrine for Southern Africa, the cautious manoeuvring of Salisbury, Bismarck and other statesmen, the impetuosity of the Kaiser and the growth of the rivalry which, despite the efforts of the press of both countries, led slowly and inevitably to war.

The chapter dealing with the struggle between the British and the Portuguese for Manicaland and Nyasaland is as exciting as a novel and shows the difficulties of European diplomats in preserving international law when adventure-loving and filibustering nationals are secretly supported by large economic corporations. To some who have seen the successful and humane administration of native areas by the British Colonial Office, especially since

the "dual mandate" theory became part of its policy, and have contrasted this with the Portuguese administration, it seems almost a pity that Lord Salisbury's regard for international law did not allow the filibusters to push on to Beira.

While Dr. Lovell tries to preserve a judicial attitude throughout, he cannot at times resist the temptation to project his personal viewpoints into the narrative. One can forgive his Gladstonian leanings, and his sarcastic references to the "humanitarian" motives of the Chartered Company, but few who have studied the work of the Scottish missionaries in Nyasaland, or even the "five per cent philanthropy" of the African Lakes Corporation, would speak so slightly of their efforts. Nowhere in his narrative does Dr. Lovell show sufficient respect for or sympathy with the Africans, bewildered as they were by the advances of mercenary whites. To him, as to many of the European statesmen of the time, they are apparently merely "niggers." This seems to the present reviewer the chief defect of an interesting but complicated story.

CHARLES T. LORAM

*Autopsy of the Monroe Doctrine: The Strange Story of Inter-American Relations.* By Gaston Nerval. New York: The Macmillan Co., 1934. pp. xiv, 357. Index. \$3.50.

This volume of fourteen chapters is a severe indictment of the Monroe Doctrine, both the modern versions and the original formula, and of the theories and practices of American officials who have conducted the Latin American policy of the United States. Its author is Raul Diez de Medina, a clever Bolivian, who was formerly connected with the Bolivian legation, and who is well known in the United States as a newspaper writer under his pen-name of Gaston Nerval. He offers evidence that the usefulness of the announcement of the original doctrine in December, 1823, was grossly over-rated and he gives to England the chief credit for arresting and disarming the exaggerated or mythical menace (or specter) of the Holy Alliance monster. He admits, however, that "the outspoken words of Monroe were not completely wasted"—that they "contributed to consolidate the position of the young Spanish American republics" and to add a large moral effect in lessening the Latin American fear of the specter of the transoceanic monster.

Following an introductory chapter on The Monroe Doctrine on Trial, in which he indicts it as in conflict with the recent post-war machinery (which has made it unnecessary), the author devotes nine chapters to the evolution, analysis and criticism of the original doctrine—against which he submits six of the ten counts of his indictment. He charges that the original doctrine was not designed for the benefit of Latin America, but for self-interest and self-protection, that its results and merits have been grossly exaggerated, that it is antiquated and useless, that it is unilateral and egoistic, that it arrested the Bolivian dream of a Pan American league of

equal rights and mutual obligations, and that it often has been violated and disregarded with American knowledge and (at times) with American connivance.

In the last four chapters, adding three more counts to his indictment, he presents graver charges of later transformations or distortions in the original doctrine by successive corollaries or capricious interpretations or misinterpretations, by metamorphosis of the doctrine, by abuses committed in its name under policies connected with American hegemony and interventions in Latin America and with American imperialism in the Caribbean. In his final chapter, on The New Deal in Pan Americanism, he suggests the immediate abandonment or burial of the corpse of the Monroe Doctrine as the first step toward the adoption of a Pan American doctrine of joint responsibility.

The volume, although many of its conclusions may not be generally accepted by American readers, is cleverly written, interesting and stimulating. It has extensive footnote references, a selected bibliography and a good index.

JAMES MORTON CALLAHAN

*Sea Power in the Modern World.* By Admiral Sir Herbert Richmond.  
New York: Reynal & Hitchcock, 1934. pp. 323. Index. \$3.00.

This recent volume from the pen of a well-known and eminently qualified British writer on naval and related subjects is full of matters of interest to both the professional seaman and the general student of national and international affairs. Through the medium of an introduction and nine chapters, sea power is discussed in its several phases of origin, causes, characteristic elements, composition of implements both qualitative and quantitative, offensive and defensive employment, and the results of its use as historically demonstrated and prophetically indicated. The introduction is largely an historic résumé of the Mahan saga leading up to modern times. The views of that author are freely cited and quoted throughout the text. The headings of the several chapters which, with one exception, are rather uniform in length, are very fairly indicative of their subject contents.

Sea power is held to be composed of three principal elements. These are naval force (the navy), shipping (mercantile marine and transports), and colonies (overseas possessions); and the development of naval force is attributed to: (a) economic necessity, lack of natural security, topographic insufficiency, and geographic isolation or circumscription; and (b) political aggrandizement or imperial expansion.

The major subject of this book covers numerous minor accessory subjects which the author presents in very readable form and arrangement, in the course of which he propounds, either directly or implicitly, not a few pertinent and interesting questions; some of which he answers with definite conviction and some he leaves in the air.

While the various types of naval craft are discussed, compared, classified,

and assigned their respective places in the scheme of things in professional terms and phraseology, the presentation of the main theme is not too technical for the general reader; and though we may not always agree with the premises, arguments and conclusions of the author, and may, indeed, entertain a suspicion that they are tinged with a faint hue of nationalism (perhaps naturally to be expected), nevertheless we will find it well worth while to have *Sea Power in the Modern World* on our bookshelf, handy for ready reference and consultation.

RAYMOND STONE

*International Organization.* By Harold M. Vinacke. New York: F. S. Crofts & Co., 1934. pp. x, 483. Index. \$5.00.

This beautifully printed volume is "designed to serve the needs of those interested in study of the restricted field of international organization." The central purpose "is to determine the nature and extent of the contemporary organization of the society of States." The author conceives that international society has the same need of agencies for legislation, adjudication, execution, and administration as does the national state. The functional approach is followed rather than a primarily descriptive one.

The first five chapters deal with introductory and background material that serves to give a setting for existing international organizations. The author discusses the state in international relations, the legal framework of international society, and the conduct of foreign relations. Two chapters (IV and V) entitled Theoretical Foundations deal with such topics as alliances, federalism, the world state, the political experience of the United States under the Articles of Confederation and the Constitution, and the "associative principle." Chapters VI, VII, and VIII deal with the legislative process in and out of the League of Nations system. Chapters IX, X, and XI are devoted to the pacific settlement of international disputes. Under the heading of the Executive Function (Chapters XII, XIII) the author discusses security, sanctions, and the supervision of the execution of the peace treaties. In Chapter XIV entitled International Administration there is an analysis of the work of the Postal Union, the Pan American Union, international regulation of waterways, sanitation and health, and the European Sugar Union. The administrative organization of the League is discussed in the last chapter (XV). No general bibliography is carried, but some references are given in footnotes throughout the study.

Since October, 1933, the number of non-permanent members of the Council is ten, rather than nine, as stated on page 106, and the total membership of the Council is fifteen, not fourteen. According to rules adopted May 26, 1933, the Council now holds four regular sessions each year, instead of three as stated at page 107. The discussion of the nature of the League of Nations (pp. 110-112) could have been strengthened by a reference to the text of the *modus operandi* signed September 18, 1926, between the League and the Swiss Government where the League is referred to as possessing "an

international personality and legal capacity." In the opinion of the reviewer, the table of contents and general arrangement of the book would be improved by a classification of the chapters into appropriate parts.

This useful volume is replete with penetrating passages showing a sound understanding of basic features of the subject dealt with. The author exhibits a keen insight into the existing agreements for world peace and international organization, and there are many passages written in the most felicitous language. He believes that the Geneva atmosphere tends to elevate "the level of conference discussions from that of narrow national interest toward that of international advantage" (p. 186).

J. EUGENE HARLEY

### Briefer Notices

*The Canadian Economy and Its Problems.* Edited by H. A. Innis and A. F. W. Plumptre. (Toronto: Canadian Institute of International Affairs, 1934. pp. vi, 356. Index. \$2.50.) In preparation for the next Institute of Pacific Relations Conference on the "aims and results of economic and social policies in Pacific countries," the Canadian Institute of International Affairs sponsored a study of Canadian economy. The results of this survey by the Toronto Branch and others have been embodied in this book under review. It is essentially a sound approach that any adequate understanding of international relations should be premised upon a thorough knowledge of national policies. With such knowledge a more intelligent attack can be made on the all too prevalent trends towards nationalism and isolationism. Part I—The Canadian Economy and the Depression—consists of contributions by seventeen economists and others who prove themselves to be particularly competent to discuss the various aspects on which they write. Of course, in a symposium such as this, the individual contributions vary widely in treatment and value. Considered as a whole, it fills a real gap in contemporary Canadian economic literature. Part II on Central Banking and Monetary Problems is less formal but of timely interest due to the recent Canadian developments along this line.

LIONEL H. LAING

*Freedom of the Seas.* By Earl Willis Crecraft. (New York: D. Appleton-Century Co., 1935. pp. xx, 304. Index. \$3.00.) Professor Crecraft has set forth in popular style and small doses (32 Chapters) the story of neutral rights and American grievances against British and Continental bad-men. The story is complete, but repetitious and characterized by a strong nationalist bias. When he is not twisting the British lion's tail, the author worries over the succumbing of Mr. Henry L. Stimson and Mr. Norman Davis to the Continental wiles and seductions of consultative pacts and definitions of "aggressors." The plea for a strong United States navy to defend our neutral rights appears and reappears in chapter after chapter, though words like "navy" and "preparedness" do not occur in the index. Professor Borchard has contributed an excellent introduction to the volume, lending his support to some of the recent suggestions of Mr. Charles Warren (*Foreign Affairs*, April, 1934). The neutrality statutes of the United States must be strengthened if the United States hopes to keep its neutrality and peace in future wars of large scope. The President should be given discretion to ban the shipment of munitions to, or the floating of private loans for, all

belligerents; "the carriage of American cargoes or American travellers on belligerent merchant vessels; the entrance of armed merchant vessels or submarines into American ports; the use of American ports as a base of supplies for belligerent warships at sea; and the service of American citizens in foreign armies, at least without forfeiture of their American citizenship." The doctrines of contraband and continuous voyage may have to be abandoned. The neutral in self-protection will have to preserve an impartiality in fact as well as in law. Professor Crecraft has evidently labored long and lovingly over the story of how neutral rights were developed through a series of compromises with belligerent interests and how belligerent interests triumphed over them in the last war because we had not a large enough navy.

HERBERT W. BRIGGS

*The Background of European Governments.* By Norman L. Hill and Harold W. Stoke. (New York: Farrar & Rinehart, 1935. pp. xvi, 604. Index. \$2.75.) This volume contains a collection of readings and materials on the organization and operation of the major governments of Europe—Great Britain, France, Germany, Italy, and Russia. The value of such a collection depends upon the care and judgment with which the material is chosen, and the skill with which it is integrated. The authors are to be commended on both counts. They have prepared a book which gives an accurate and at the same time an interesting account of the form and functioning of the governments. An effort has been made to include readings which make clear the underlying motives that are responsible for the new forms of political organization which have been evolved in Russia, Italy, and Germany. As an auxiliary text for students of government this book will be invaluable. It can be heartily recommended, also, to those who have a general interest in international affairs. A perusal of its pages will give one a knowledge of the theory of Communism, Fascism, or Nazism, and of how that theory is translated into political action through the organs of government. A comparison of these authoritarian forms with the democratic institutions of Great Britain and France is made easy where both are treated between the covers of one volume. WALTER H. MALLORY

*Fourth Report on Progress in Manchuria to 1934.* Compiled by Seiji Hishida. (Dairen: The South Manchuria Railway, 1934. pp. xii, 294. Index.) Students of Manchurian affairs have long recognized the value of these reports issued by the South Manchuria Railway Company. The present volume maintains the high standard of its predecessors, and has been expanded considerably as regards content. There is an introductory chapter dealing with the status of Manchoukuo and its special relationship to Japan. Brief chapters are devoted to geography and to history. In Chapter III there is extensive treatment of Manchuria's relationships with the League of Nations. Other chapters deal with such topics as Peace and Order, Manchoukuo Government, Japanese Jurisdiction, Manchoukuo Finances, Transportation and Communication, Foreign Trade, Agriculture, Mining, Forestry, Fisheries, Industry and Education. There is a large map and extensive statistical tables. The report is based primarily, as in the past, on findings of the research office of the South Manchuria Railway, supplemented by the work of the Statistics Office of the Manchoukuo Government, in which a number of Japanese experts are employed. The appendices covering some fifty pages contain a number of important inter-

national documents and laws issued by the new state. The volume is a distinct contribution as a statistical and interpretative record of recent events in Manchuria. Dr. Hishida's interpretation of political developments may be challenged by many Western students. They represent, nevertheless, a point of view which it is essential the West should understand.

PAUL HIBBERT CLYDE

*Staatsschiffe und Staatsluftfahrzeuge in Völkerrecht.* By Herbert Klein. (Königsberg and Berlin: Im Ost-Europa-Verlag, 1934. pp. 101. Rm. 4.80.) This book draws certain comparisons between the principles applicable to public vessels and aircraft in international law. The discussion embraces four chapters. The first treats the basic concepts of the two types of craft. The second, comprising the bulk of the book, deals in some detail with war vessels and military aircraft. The third briefly discusses public craft of a non-military character. The concluding chapter touches public commercial craft. The conclusion recognizes three categories of vessels. The extent of exemption of each class from foreign jurisdiction turns on the degree of sovereign representation in the performance of special functions. The fullest exemption is enjoyed by military vessels, including even their crews. A second category embraces quasi-public vessels exercising postal, customs and police functions without performing sovereign acts. Crews of such vessels enjoy no extraterritorial privileges. The third category includes vessels operated by the State purely in its proprietary or commercial activities. These receive no immunities. Modern economic trends furnish the key to this differentiation of rights of public vessels abroad.

HOWARD S. LEROY

*Répertoire de Droit International.* By A. de La Pradelle and J. P. Niboyet. *Supplément*, by J. P. Niboyet. (Paris: Recueil Sirey, 1934. pp. vi, 480. Fr. 120.) The editors of the *Répertoire de Droit International*, who performed the remarkable feat of getting out the ten volumes of their encyclopaedia in the years between 1929 and 1931, have in this supplementary volume carried out their promise of bringing the material of the encyclopaedia down to date (January, 1934). In addition they have taken the opportunity of including in the *Supplément* certain words which could not find their place in the original volumes, prominent among which are *Etablissement* (business domicile), Egypt, Sovereigns, Treaties, and Tunis. The article on Egypt is exceedingly valuable for the student of the conflict of laws, since it gives a detailed analysis of the rules followed both by the mixed and by the non-mixed courts. The article on Treaties is devoted exclusively to the general theory of treaties, and is a small volume in itself and covers every important phase of the subject. The article on Tunis is exhaustive and fills adequately the gap in the original volumes. Among other topics of recent interest, the title Great Britain carries a detailed examination of the Foreign Judgments Act of 1933.

C. G. F.

*The League Year-Book, 1933.* Second Annual Edition. Edited by Judith Jackson and Stephen King-Hall. (New York: The Macmillan Co., 1933. pp. xiv, 468. Index. \$4.50.) This Year-Book, carrying a foreword by Viscount Cecil, consists of three parts. Part I deals with the membership, purposes, organization, and finances of the League. Information is also found regarding the Secretariat, the International Labor Organiza-

tion, and the Permanent Court of International Justice. The Assembly and the Council are treated as to their authority, duties, membership, and procedure. There is a brief discussion of the work of the League with regard to communications, transit, health, and intellectual coöperation. Attention is given to the Permanent Advisory Commissions regarding military questions and those relating to narcotics, opium, welfare of women and children, and the temporary advisory commissions. Chapter IX gives information concerning special questions such as the Saar, Danzig, minorities, and trusteeships for loans. Chapter X deals with international bureaux and institutes. In Part II (pp. 198-235), there is a survey of the activities of the League in 1932-1933 by Mr. C. A. Macartney. Part III gives the names of members of committees, commissions, the Secretariat permanent national liaison agents, and the principal officers and headquarters of the League of Nations Societies in the various countries. Appendices carry the text of the special procedure of the Assembly in electing non-permanent members of the Council and that of the Council to be followed in the event of war or threat of war. A selected bibliography, partly annotated, is given at pages 392-454. The work gives a good deal of information about the League and its related organizations that would be burdensome to secure otherwise. A year by year record of this kind will serve to facilitate studies by English-speaking peoples. Inasmuch as English is an official language of the League, a Year-Book in English is necessary. Ottlik's *Annuaire de la Société des Nations* serves those more familiar with the French language.

J. EUGENE HARLEY

*Air Law. Outline and Guide to Law of Radio and Aëronautics.* By Howard S. LeRoy. (Washington: Randolph Leigh Publishing Co., 1935. pp. 120. Index. \$3.00.) This little book is an excellent auxiliary tool for anyone working in the fields covered. It is confined for the most part to titles and citations, with very brief comments which permit of broad classification, under four principal headings: Radio law, aëronautic law, air rights as related to real property, and bibliography. The treatment is comprehensive for the United States. The international aspects and the acts of foreign states are not so completely covered, and in that respect the book should be strengthened in the revisions which are inevitable for any book on this rapidly growing subject.

IRVIN STEWART

*Wesen und Umfang des Staatsgebietes.* By Dr. Wolfgang Schade. (Berlin-Grunewald: Verlag für Staatswissenschaften und Geschichte, 1934. pp. xiv, 112. Rm. 8.) This monograph, one of the series of *Internationalrechtliche Abhandlungen* issued under the direction of Professor Herbert Kraus, treats of the nature and scope of the state's jurisdiction in its wider sense. The author defines state jurisdiction under the various theories which have prevailed from time to time at different periods and in different states. He arrives at the conclusion that the theory of competence is the one most applicable to modern conditions. The author discusses various applications of the theory and tests it out, especially in respect to jurisdiction not partaking of territorial sovereignty in the narrower sense. In the chapters on territorial sovereignty over territorial and coastal waters and in the airspace, he discusses a number of controversial questions and associates these with a discussion of jurisdiction exercised by states upon the high seas. One of the conclusions of the author will probably not

receive general acceptance. It is that in which he places the parts of the Polar seas which are frozen over throughout the year within the same category as land territory and even maintains that such parts are subject to occupation (pp. 32-33). The approach, generally speaking, is entirely scientific and is not clouded by current political controversy.

ARTHUR K. KUHN

*The Study of International Relations in the United States.* Edited by Edith E. Ware, Ph.D. (New York: Columbia University Press, 1934. pp. xviii, 503. Index. \$3.50.) The word "study" in this book is broadly used. It includes the Organization and Agencies of Research, the Disciplines of Study and Research, the Regional Fields of Study and Research, Education in International Relations and the League of Nations in regard to Research in International Relations. It covers, under the head of International Relations, all the social sciences. From whatever angle one is interested in international affairs, the book will be useful for knowledge of the agencies in the field and inspiring because of its revelation of what is being done. The range of both is amazing, even to those well acquainted with the subject. Miss Ware is quite justified in her statement that it reveals "in the American people a really remarkable interest in international relations." The work was done under the guidance of Dr. James T. Shotwell for the American National Committee on Intellectual Coöperation of the League of Nations. Dr. Shotwell contributes a thoughtful and suggestive introduction. The volume contains material of interest to researchers in the social sciences, to those interested in curriculum-making, to business and financial men who are affected by international developments, and to many others. It is maintained that the study of international affairs must be by regional areas. A study of Europe, it appears, means a study of world affairs; the regions which are to be studied are the Pacific area, Latin America and—latest of all—Canada. The book reflects also the modern educational trend toward integration. Persons interested in special fields may be able to find gaps but, on the whole, it is a remarkably complete and helpful book.

CLYDE EAGLETON

*Der Art. 19 der Völkerbundsatzung.* By Viktor Böhmert. (Kiel: Verlag des Instituts für Internationales Recht, 1934. pp. xvi, 241. Rm. 7.50.) This monograph is a valuable and scholarly contribution to the growing literature on treaty-revision, a subject in which German scholars naturally have a special interest. The author clearly distinguishes between the provisions contained in Article 19 of the Covenant for the revision of treaties and the doctrine of *rebus sic stantibus*. From a study of the effect of impossibility of performance upon treaties in international law, he concludes that it would be absurd to consider that condition the sole ground upon which the Assembly may advise the reconsideration of treaties, considering that most writers regard that as a proper ground for terminating a treaty unilaterally. The conclusion to which the author comes, based upon a study of the origin of the article, in particular, the opinions of President Wilson and Lord Robert Cecil, of the reasonable meaning of the words used, and of the interpretation given to the article in practice, is that Article 19 should be interpreted liberally as empowering the Assembly to recommend the reconsideration of treaties no longer conducive to peace and justice, and the consideration of situations which, though they may not lead to war,

endanger the friendly relations upon which peace depends. The author deals intelligently, though at some unnecessary length, with procedural questions relating to the application of Article 19. He is of the opinion that since Assembly action under Article 19 is in the nature of a recommendation only, the rule of unanimity does not apply. Consideration of the question whether the interested parties may vote is the occasion of a suggestive note on League practice regarding the right of parties to vote. The study is well documented and contains a useful bibliography.

*The Doctrine of "Rebus Sic Stantibus" in International Law.* By Chesney Hill. (Columbia: University of Missouri, 1934. pp. 95. \$1.25.) This study, we are told, was prepared as a doctoral dissertation at Harvard under the title *The Termination of Outlets Treaties*. It was subsequently rewritten and condensed. The author has made a real contribution in defining, by reference to accepted evidences of international law, the content of a much used and much abused principle. He makes it clear that "the doctrine of *rebus sic stantibus* is a rule for the termination of treaties, and not for revision." The doctrine is "based juridically upon the intention of the parties." It is a rule for carrying that intention into effect. The author clearly sets forth the limitations upon the doctrine. The definition of the doctrine given at the conclusion of the study seems to the reviewer to be concise, clear and adequate. The study contains an exhaustive bibliography which in itself should be of value to students of the subject.

LELAND M. GOODRICH

*Le Controle Juridictionnel de l'Administration: Étude de Droit Administratif Comparé.* By Roger Bonnard. (Paris: Librairie Delagrave, 1934. pp. 266. Fr. 45.) This is the sixth volume in the series of studies on public law issued by the International Institute of Public Law. Its author is a distinguished professor of the faculty of law at the University of Bordeaux. The first half of the study is devoted to a discussion of the principles underlying jurisdictional intervention in administrative controversies. The second part investigates the organs of jurisdictional control, including both ordinary and administrative courts. Then follows a comparative study of the systems of Great Britain and the United States, France, Yugoslavia, Belgium, Italy, Greece, Rumania, Germany, Switzerland, Austria, Poland and Czechoslovakia. Particularly perspicuous are the pages wherein Professor Bonnard analyzes the contrast between the Anglo-American system and the French system. Under the latter régime, by virtue of a strict theory of separation of powers, the ordinary tribunals have been almost completely excluded from taking cognizance over administrative controversies. Professor Bonnard refrains from asserting that either system better safeguards the rights of the individual.

*Essai sur le Travail Parlementaire et le Système des Commissions.* By Joseph-Barthélemy. (Paris: Librairie Delagrave, 1934. pp. 375. Fr. 50.) This essay comes from the pen of a well-known jurist, parliamentarian and member of the faculty of law of the University of Paris. It is the ripe conclusion of many years of intimate observation of parliamentary methods. Professor Barthélemy long sat in the Chamber of Deputies as a deputy from Gers, for years he served as secretary of the Chamber, and more than once presided over a commission. He presents a vivid picture of the French commissions, which are fundamentally unlike the British select and standing committees, and frequently charged with contributing to the instability of French Cabinets. After a brief review of the history of the permanent

establishment of the commissions (in 1902, for the Chamber of Deputies, and in 1920, for the Senate), the author discusses their organization, the selection of members, their rôle in lawmaking, and their part in effecting legislative control over the executive. Separate chapters are devoted to the Commission of Finance and the Commission of Foreign Affairs.

In regard to the Commission of Foreign Affairs, the author admits the tendency to substitute the control of the Commission for the control of the Chamber. Naturally, Ministers look upon the Commission as an instrument of torture, but the Chamber regards it as a means of regulation. As a member of the Commission of Foreign Affairs, Aristide Briand frequently complained that Ministers did not sufficiently consult the Commission. But, on occasions, when he headed the *Quai d'Orsay*, Briand ignored the Commission, and at one time did not go near it for thirteen months. But if Briand were ever unmindful of the formidable character of the Commission, the affair of Cannes, in 1922, proved its power to reverse the foreign policy of any Cabinet, including his own.

KENNETH W. COLEGROVE

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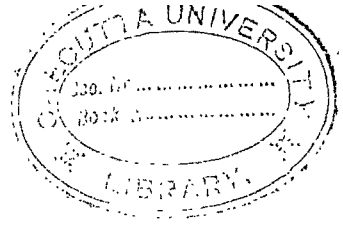
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## THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW

BY QUINDY WRIGHT  
*Of the Board of Editors*

The press reports characterized the resolution of the Chaco Commission of the League of Nations Assembly as amounting "to condemning Paraguay henceforth as the aggressor in the Chaco War."<sup>1</sup> This resolution of January 16, 1935, recommended a raising of the arms embargo in behalf of Bolivia, because Bolivia had accepted and Paraguay had rejected the Assembly's report made on November 24, 1934, under Article 15, paragraphs 4 and 9 of the Covenant. The Commission also held that in spite of the provisions in Article 12 by which the members of the League "agree in no case to resort to war until three months after . . . the report of the Council" (or Assembly, see Art. 15, par. 10), Paraguay was bound not to go to war against Bolivia at the expiration of this period (February 24, 1935) because of Article 15, paragraph 6, by which "the members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report." It is to be observed that Paraguay actually declared itself in a state of war with Bolivia on May 10, 1933, and in its report on November 24, 1934, the Assembly noted "the present state of breach of the Covenant."<sup>2</sup>

These resolutions will doubtless be important in developing the legal conception of aggression.

The words "aggressor" and "aggression" have been coming into current usage as terms of international law in connection with the post-war effort to control the incidence of violence in international relations through the functioning of treaties and international organizations. The words appear very little in treatises on international law until after the World War, but in editions published since 1925, they are often to be found in the indexes,<sup>3</sup> and

<sup>1</sup> New York Times, Jan. 17, 1935, p. 1.

<sup>2</sup> League of Nations Monthly Summary, January, 1935, Vol. 15, p. 9. For earlier developments in the Chaco dispute see, League of Nations, Report of the Chaco Commission, May 11, 1934, Political, 1934, VII, 1; Information Section, Assembly Report on the Dispute between Bolivia and Paraguay, Nov. 24 1934; Cooper, Russell, and Mattison, Mary, "The Chaco Dispute," Geneva Special Studies, 1934, Vol. 5, No. 2; Mattison, Mary, "The Chaco Arms Embargo," *ibid.*, 1934, Vol. 5, No. 5; Woolsey, L. H., "The Chaco Dispute," this JOURNAL, Vol. 26 (1932), p. 796, Vol. 28 (1934), p. 724; Wilson, G. G., *ibid.*, Vol. 27 (1933), p. 724. For political and economic background of the war, see Lindsay, J. W., "The War over the Chaco," International Affairs, March-April, 1935, Vol. 14, p. 231 ff.

<sup>3</sup> The word does not appear in the indexes to Moore, Digest of International Law, 1906; Hershey, Essentials of International Public Law, 1912; Westlake, International Law, 2nd

since that date the subject has been dealt with in books on international organizations <sup>4</sup> and in numerous pamphlets and articles by both statesmen <sup>5</sup> and jurists <sup>6</sup> as well as in official texts.<sup>7</sup>

ed., 1913; Oppenheim, *International Law*, 3rd ed., 1920; Hyde, *International Law*, 1922; Lawrence, *Principles of International Law*, 7th ed., 1923; Hall, *International Law*, 8th ed., 1924; Fenwick, *International Law*, 1924; Wilson, *International Law*, 1927. It does, however, appear in Oppenheim, 4th ed., 1926; Hershey, 2nd ed., 1927; Stowell, *International Law*, 1931; Fenwick, 2nd ed., 1934.

<sup>4</sup> Baker, P. J. N., *The Geneva Protocol*, London, 1925; Buell, R. L., *International Relations*, 2nd ed., N. Y., 1929, Chap. 26; Clark, Evans, *Boycotts and Peace*, N. Y., 1932; Eagleton, Clyde, *International Government*, N. Y., 1932, pp. 125, 440-448; Evans, T. P. Conwell, *The League Council in Action*, Oxford, 1929, pp. 59, 253-259; Guggenheim, Paul, *Les Mesures provisoires de procédure internationale*, Paris, 1931, Chap. 9, p. 194; Hudson, Manley O., *Progress in International Organization*, Stanford, 1932, Chap. 8; Kunz, Josef, *L'Article XI du Pacte de la Société des Nations, Académie de droit international*, 1933, Chap. 5; Miller, Hunter, *The Geneva Protocol*, N. Y., 1925, Chap. 10; *The Peace Pact of Paris*, N. Y., 1928, p. 127; Mower, E. C., *International Government*, N. Y., 1931, pp. 116-123, Chap. 30; Rappard, W. E., *Uniting Europe*, New Haven, 1930, pp. 159-165, 284-288; Ray, J., *Commentaire du Pacte de la Société des Nations*, Paris, 1930, part 3; Schuman, Frederick L., *International Politics*, N. Y., 1933, pp. 685-685; Shotwell, James T., *War as an Instrument of National Policy*, N. Y., 1929, Chap. 19; Webster, C. K. and Herbert, S., *The League of Nations in Theory and Practice*, London, 1933, p. 155; Williams, Sir John Fischer, *Some Aspects of the Covenant of the League of Nations*, Oxford, 1934, pp. 119-123, 229-242, 292-317.

<sup>5</sup> Beneš, Eduard, *The Diplomatic Struggle for European Security and Stabilization of Peace*, Prague, 1925; Kellogg, Frank B., "The War Prevention Policy of the United States," *Foreign Affairs*, Spl. Supp., April, 1928, pp. viii-ix; Politis, Nicolas S., "The Problem of Disarmament," *International Conciliation*, March, 1934, No. 298; Stimson, Henry L., "The Pact of Paris, Three Years of Development," *Foreign Affairs*, Spl. Supp., October, 1932, pp. viii-ix.

<sup>6</sup> Brierly, J. L., "Sanctions," *Proceedings of the Grotius Society*, 1931, pp. 12-13; Eagleton, Clyde, "The Attempt to Define Aggression," *International Conciliation*, November, 1933, No. 264; "The Attempt to Define War" *ibid.*, June, 1933, No. 291; Finch, George A., "A Pact of Non-Aggression," *this JOURNAL*, Vol. 27 (1933), pp. 725-732; Harris Foundation, *An American Foreign Policy toward International Stability*, 1934, pp. 28-33; Hill, Chesney, "Recent Policies of Non-Recognition," *International Conciliation*, October, 1933, No. 293, pp. 372-380; Hill, Norman L., "Post War Treaties of Security and Mutual Guarantee," *International Conciliation*, November, 1928, No. 244; Jessup, Philip, "American Neutrality and International Police," *World Peace Foundation*, 1928, Vol. 11, pp. 81-95; Potter, Pitman B., "Sanctions and Security, an Analysis of the French and American Views," *Geneva Special Studies*, February, 1932, Vol. 3, No. 2; Whitton, John B., "What Follows the Pact of Paris?" *International Conciliation*, January, 1932, No. 276, pp. 35-39; Wright, Q., "Neutrality following the Pact of Paris," *Proceedings American Society of International Law*, 1930, pp. 79, 86; "Collective Rights and Duties for the Enforcement of Treaty Obligations," *ibid.*, 1932, p. 111; "The Future of Neutrality," *International Conciliation*, September, 1928, No. 242, p. 260 ff; "Changes in the Concept of War," *this JOURNAL*, Vol. 18 (1924), p. 767; "The Outlawry of War," *ibid.*, Vol. 19 (1925), pp. 89-103; "When Does War Exist?" *ibid.*, Vol. 26 (1932), pp. 367-368; "The Meaning of the Pact of Paris," *ibid.*, Vol. 27 (1933), pp. 51-56; "The United States and Neutrality," *Public Policy Pamphlet No. 17*, University of Chicago Press, May, 1935.

<sup>7</sup> These include the League of Nations Covenant, 1920 (Arts. 10, 12, 13, 15); the proposed

## 1. CONSEQUENCES OF AGGRESSION

While there has been much controversy as to the nature of the test which should be applied for determining the aggressor in particular instances, the conception of aggression in terms of its consequences seems to be well established. *An aggressor is a state which may be subjected to preventive, deterrent or remedial measures by other states because of its violation of an obligation not to resort to force.* There can not be an aggressor in the legal sense unless there is an antecedent obligation not to resort to force. Doubtless there are some such obligations in customary international law; thus the pre-war textbooks define limitations upon the resort to intervention and reprisal, upon the use of force during a state of war, and even upon the initiation of a state of war, although during the nineteenth century the latter was considered a moral rather than a legal question.<sup>8</sup> Treaties, however, especially post-war treaties, have imposed extensive obligations not to resort to force, and the conception of aggression has developed mainly in connection with the interpretation and application of these treaties, of which the League of Nations Covenant and the Pact of Paris have been the most widely ratified.<sup>9</sup>

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Treaty of Mutual Assistance, 1923 (Arts. 1-3); the Geneva Protocol, 1924 (Arts. 2, 7-10); the Locarno Treaty, 1925 (Arts. 2, 4); The Declarations on Aggressive War of the 8th Assembly of the League, 1927, and of the Sixth Conference of American States, 1928; the Pact of Paris, 1928; the report adopted by the League Council and Assembly on Article XI of the Covenant, 1928; the Model Convention on Mutual Assistance, 1928 (Art. 1); the Convention on Financial Assistance, 1930 (Arts. 1, 2); the General Convention to Improve the Means for Preventing War, 1931 (Arts. 1-6); the Declaration of the General Commission of the Disarmament Conference defining "Aggressor," 1933; the Litvinoff Convention defining aggression, 1933. The preparatory materials and subsequent interpretations of these documents are also important, especially the reports of the Permanent Advisory Commission, the Temporary Mixed Commission and the Committee of Jurists on the proposed treaty of Mutual Assistance, 1923; the "American Draft" and Commentary (Shotwell), and the Politis and Beneš Commentaries on the Geneva Protocol, 1924; the Brouckère Memorandum on Article 16 (1927), the Politis Memorandum on Security and the Rutgers Memorandum on Articles 10, 11, and 16 of the Covenant submitted to the Committee on Arbitration and Security, 1928; and the statements by President Franklin D. Roosevelt, Ambassador Norman Davis, and Foreign Minister Litvinoff concerning aggression, 1933. The pertinent provisions of these documents before 1930 are conveniently collected in Eagleton, "The Attempt to Define Aggression," *International Conciliation*, November, 1930, No. 264. See Myers, "World Disarmament," *World Peace Foundation*, 1932; United States Department of State Press Releases, May 20, 27, 1933, and Korovine, E. A., "The U. S. S. R. and Disarmament," *International Conciliation*, September, 1933, No. 292, for more recent documents. For official publication of the League texts see Reports and Resolutions on the subject of Article 16 of the Covenant, *Legal* 1927. V. 14; Arbitration and Security, *Systematic Survey of Conventions*, 2nd ed., *Legal* 1927. V. 29; Documents of the Preparatory Commission of the Disarmament Conference, Series III, Disarmament. 1927. IX. 2; Series VI, Disarmament. 1928. IX. 6.

<sup>8</sup> Wright, Q., "Changes in the Concept of War," *this JOURNAL*, Vol. 18 (1924), p. 755 ff; "The Outlawry of War," *ibid.*, Vol. 19 (1925), pp. 83-96.

<sup>9</sup> *Supra*, note 7.

It must be emphasized that aggression is not the equivalent of the violation of an international obligation. Thus a state's refusal to submit a dispute to arbitration or to carry out an arbitral award in the teeth of an explicit treaty obligation, while a breach of international law, is not necessarily a case of aggression. Even resort to force by the state after such refusal would not be aggression unless the arbitration treaty or some other treaty to which it is a party, or general international law, imposed an obligation not to resort to force under the circumstances.

The definition here proposed makes the term aggression broader than an illegal resort to war. Aggressive war resulting from the violation of an anti-war treaty is one form of aggression, but many treaties impose obligations not to resort to force short of war and the use of armed violence contrary to such treaties would be aggression, even though not war.<sup>10</sup>

Even if a state violates an obligation not to resort to force, it would still not be an aggressor under the definition proposed unless the law draws some practical consequences therefrom. Several official texts have described aggressive war as a crime,<sup>11</sup> but the definition here proposed does not demand that the consequence of aggression be of the nature of criminal liability. The measures consequent upon aggression may be preventive, deterrent or remedial rather than punitive, and their application may be discretionary rather than obligatory with other states, but unless there is some sanction, some legal consequence of the breach, the breaker is not, under this definition, an aggressor.

The Covenant contains obligations not to resort to force of certain kinds and in certain circumstances in Articles 10, 12, 13, and 15. All of these obligations are so sanctioned that their violation can properly be considered an aggression. There has been doubt whether a breach of the Pact of Paris carried any legal consequences, but the course of practice, official opinion and juristic interpretation indicate that it does. The Budapest articles of interpretation (1934) unequivocally adopted this opinion in holding

In the event of a violation of the Pact by a resort to armed force or war by one signatory state against another, the other states may, without thereby committing a breach of the Pact or of any rule of international

<sup>10</sup> Sir John Fischer Williams has interpreted the phrase "resort to war" in the Covenant as equivalent to "recourse to armed force" (*op. cit.*, p. 313), but this is not universally accepted. See observations of committee of jurists on Draft Treaty of Mutual Assistance, 1923, Records of 4th Assembly, 3rd Committee, pp. 189-191, Eagleton, International Conciliation, No. 264, p. 628; Brouckère Memorandum on Article 16, Documents of the Preparatory Commission of the Disarmament Conference, Series III, Disarmament, 1927, IX, 2, pp. 93-105. The prohibition of non-peace means in Art. 2 of the Pact of Paris prohibits the use of armed force short of war. See Budapest Articles of Interpretation, International Law Association, 1934; Wright, "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), p. 53.

<sup>11</sup> See declarations on aggressive war of League of Nations Assembly, 1927, and of the Sixth Conference of American States, 1928, Eagleton, Int. Con. No. 264, pp. 651-652.

law, do all or any of the following things: (a) refuse to admit the exercise by the state violating the Pact of belligerent rights, such as visit and search, blockade, etc.; (b) decline to observe towards the state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent; (c) supply the state attacked with financial or material assistance, including munitions of war; (d) assist with armed forces the state attacked.

The signatory states are not entitled to recognize as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact.

A violating state is liable to pay compensation for all damage caused by a violation of the Pact to any signatory state or to its nationals.

While under both the Covenant and the Pact all parties may under certain circumstances go to war against the aggressor, such a procedure is not contemplated by these instruments and it appears that in some cases of aggression such extreme measures would be illegal. Aggression may take place without instituting a state of war. This may happen in cases of "external aggression against the territorial integrity or political independence" of a member of the League contrary to Article 10 of the Covenant, or in cases of resort to "non-pacific means" in the settlement of an international controversy contrary to Article 2 of the Pact of Paris. While in such cases the other parties to these instruments might discriminate in their behavior to the disadvantage of the aggressor, it would appear that they would be violating their own obligations if they immediately went to war against him. Only if the aggression has resulted in a state of war is the latter procedure legitimate. Under the Pact of Paris states are never permitted to go to war except against a state already at war, and under the Covenant they are not permitted to go to war without first exhausting the procedures specified in Article 12, except against a state already at war.<sup>12</sup>

## 2. TESTS OF AGGRESSION

It, however, is of little practical value to know the consequences of aggression unless adequate tests for determining the aggressor have been accepted. The various disputes which have been dealt with in recent years show great progress in developing such tests. The difficulty remains of organizing the will of the parties to the treaties to apply these tests sufficiently expeditiously; to decide in particular circumstances what, if any, measures would be effective to prevent present and deter future aggressions; and to apply such measures as are decided upon. These are grave practical problems but they do not affect the theoretical solution of the problem of determining the aggressor. This problem has in fact presented less diffi-

<sup>12</sup> Secretary General of League of Nations, Memorandum on Article 16, 1927, Reports and Resolutions on Article 16, Legal. 1927. V. 14, p. 88; Wright, "The Future of Neutrality," International Conciliation, No. 242, p. 371; "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), p. 51.

culty than is often supposed. The League of Nations Assembly had no difficulty in concluding on February 24, 1933, that "the presence of Japanese troops outside the zone of the South Manchuria Railway and their operations outside this zone are incompatible with the legal principles which should govern the settlement of the dispute," and that "while at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to lie on one side and the other, no question of Chinese responsibility can arise for the development of events since September 18, 1931." While the consequences drawn from this recognition of Japanese aggression were not as extensive as might have been expected, it was explicitly stated that the circumstances "exclude the maintenance and recognition of the existing régime in Manchuria" and "any act which might prejudice or delay the carrying out of the recommendation of the present report."<sup>13</sup> The recognition that Paraguay was an aggressor in the report of the Assembly's commission on January 16, 1935, was even more explicit and the legal consequences involving a discriminatory arms embargo were more extensive.<sup>14</sup>

Before considering the tests of aggression applied in these cases it may be well to classify the various tests which have been proposed, not only in recent discussions but in the age-long consideration of the problem of just war. Three classes of tests may first be distinguished according as the events considered to have decisive importance occurred before fighting began, at the time fighting began, or after fighting was in progress. Each of these three classes of tests may again be divided into four according as attention is directed primarily to legal, military, psychological, or procedural events. Thus a total of twelve types of tests may be distinguished, combinations of which may result in an even larger number. The legislator's task is to select the one of these numerous possible tests most appropriate to the object of preventing aggression.

The tests giving weight to events which occurred before fighting began, while perhaps best conforming to the usual conception of justice,<sup>15</sup> are incapable of rapid application. The litigating states have been in relations a long time before the incident in question and the record of these relations is not usually easily available. Hundreds or thousands of events have occurred which may or may not be pertinent to the controversy which led to violence and the evaluation of which is a matter of long and laborious analysis. To say with Grotius that a just war is one begun for defense, for recovery of property, or for punishment sounds reasonable,<sup>16</sup> but to decide

<sup>13</sup> See Hudson, M. O., "The Verdict of the League, China and Japan," World Peace Foundation, 1933, pp. 73, 78, 81.

<sup>14</sup> League of Nations Monthly Summary, January, 1935, Vol. 15, p. 9.

<sup>15</sup> Thus the belligerents of the World War have published extensively their archives from 1870 to 1914 to relieve themselves of the stigma of "war guilt" apparently on the assumption that the diplomatic events of this period were pertinent in this connection but those during and since the war were not.

<sup>16</sup> *De Jure Belli ac Pacis*, lib. II, c. 1, sec. 2, par. 2.

whether A was entitled to defend a given territory rather than its antagonist B, whether the property which A is trying to recover was really its property, whether B whom A is trying to punish had committed an offense, may require years of juridical and historical research. Difficulties are no less, even greater, if we center our interest in the military field and ask who was responsible for starting an armament race, or in the psychological field and ask who had developed a spirit of aggrandizement, or in the procedural field and ask who during the course of the controversy had refused to accept reasonable proposals of pacific settlement. Such examinations of the merits of the controversy, while perhaps appropriate to the deliberate procedures after hostilities have ended, are valueless for stopping the war.<sup>17</sup>

The tests confining attention to events which occurred at the time fighting began, while perhaps conforming less to the usual conception of justice, conform more to the usual conception of aggression<sup>18</sup> and are more capable of rapid application because the number of pertinent events to be evaluated is more limited. There is, however, the difficulty that the events occurring when and where hostilities began are likely to be witnessed only by excited or prejudiced observers. The difficulty which the Lytton Commission had in discovering and stating whether there was an explosion on the South Manchuria Railway tracks on September 18, 1931, and if there was, how grave it was, and who was responsible for it, illustrates the point.<sup>19</sup> The difficulties are similar whether we inquire who first invaded someone else's territory, committed other acts of war, or omitted legal formalities in the initiation of hostilities; who first issued a mobilization or other military order rendering an offensive movement inevitable; who, at the moment hostilities began, wanted war and who did not; who, at that moment, was ready to arbitrate or conciliate, and who was not.<sup>20</sup> The difficulty in applying such tests is wit-

<sup>17</sup> The historians dealing with responsibility for the World War have often attempted to apply such a test but with the added difficulty that they have applied it to determine the degrees of conformity to unstated moral obligations rather than to definite legal obligations not to go to war. See Wright, *Current History*, 1924, Vol. 20, pp. 456-457, reprinted in Barnes, H. E., *In Quest of Truth and Justice*, Chicago, 1928, pp. 192-194. The article on "War Guilt" in the *Encyclopedia Britannica* (14th ed) gives space to protagonists on each side and illustrates the improbability of an objective judgment by any one using the historical method for this purpose.

<sup>18</sup> The *Century Dictionary* defines aggression: "The act of proceeding to hostilities or invasion," and the *Standard*: "An unprovoked attack or encroachment." *Bouvier's Law Dictionary* defines "Aggressor": "He who begins a quarrel or dispute either by threatening or striking another." The word is derived from the Latin *aggressio* from *ad gradi*, to go to, approach, attack.

<sup>19</sup> League of Nations, *Appeal of the Chinese Government*, Report of the Commission of Enquiry, Political, 1932, VII, 12, pp. 67-71. See also League of Nations Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece, Report, Nov. 28, 1925, p. 3.—"It is impossible to determine which of the two soldiers fired the first shot."

<sup>20</sup> See reports of League of Nations, Permanent Advisory Commission and Temporary Mixed Commission on Armaments, 1923, Records of the 4th Assembly, 3rd Committee, pp. 115-118, 159-191, *Eagleton*, Int. Con. No. 264, pp. 621-627.

nessed by the vigorous controversy among the historians of the immediate origin of the World War. Nevertheless, it is possible that certain tests of this character, precisely defined, might be useful. The American proposal of May 22, 1933, defining the aggressor as "One whose armed forces are found on alien soil in violation of treaties," and in the Geneva Protocol (Art. 10), defining the aggressor as "Every state which resorts to war in violation of the undertakings (for pacific procedure) contained in the Covenant or in the present Protocol" have been a contribution to the subject. Such tests, however, dependent upon an appreciation of unexpected circumstances at a time of unusual tension, are seldom capable of providing the rapid and precise conclusions which a war prevention procedure demands.

Tests based upon events after fighting is in progress suffer no disadvantage from the fact that they are inapplicable to prevent hostilities altogether. So long as hostilities have not begun, there is, properly speaking, no aggressor, and efforts to find one can only injure the prospects of preventing hostilities.<sup>21</sup> These tests have the great advantage that they may make use of events which are uncontroversial because they were prepared or observed with the clear understanding that they might provide a test of aggression. The application of this type of test has, in short, all the advantages of the experimental method over the historical method from the standpoint of precise observation and description. Assuming, then, that the best test for aggression is to be found in confining attention to events which have occurred after hostilities have begun, should prime consideration be given to psychological, military, legal or procedural aspects of such events? The motives of states engaged in hostilities are not easy to observe directly. Diplomatic statements, parliamentary debates, and the press are given to exaggeration in time of hostilities, and the motives of those in authority are affected by immediate internal politics and external pressures as well as by long-time views of national policy. Thus, events in the field of opinions and attitudes during hostilities are inadequate to provide tests of aggression, although a careful analysis of such materials may be of value in devising workable programs of conciliation.<sup>21a</sup>

The Lytton Commission attached weight to the fact that the Japanese were better prepared than the Chinese when hostilities began on the night of September 18-19.<sup>22</sup> While such an appraisal of military plans at the time

<sup>21</sup> Wright, "Collective Rights and Duties for the Enforcement of Treaty Obligations," *Proc. Am. Soc. Int. Law*, 1932, pp. 110-111, 115-116.

<sup>21a</sup> A recent commentator endorses Secretary of State Bryan's understanding in 1915 that "the responsibility for continuing the war is just as grave as the responsibility for beginning it," but realizes the difficulty of determining which side wanted to continue without a reasonable proposal from outside. Walter Millis, *Road to War*, 1935, p. 78.

<sup>22</sup> *Infra*, note 45. See also League of Nations Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece, Report, Nov. 28, 1925, p. 7.—"There can be no question of premeditation on either side. The operation orders of the various units show that neither of the armies was prepared for operations amounting to war."

the incident arose may be of value, it is doubtful whether the relative efficiency of the combatants after hostilities are well under way has much bearing upon the determination of the aggressor. Military efficiency may exhibit some correlation with aggressiveness, but it is doubtful whether the correlation is sufficient to justify the conclusion that the more efficient belligerent is invariably to be branded as the aggressor.

An appraisal of the behavior of the states engaged in hostilities, according to the rules and standards of international law dealing with the conduct of hostilities, is usually controversial, and in any case throws little light on the question of aggression. A state by strictly observing the rules of war does not necessarily manifest a willingness to abide by obligations not to resort to force, although belligerents usually assume that the alleged violations of the rules of war by the enemy demonstrate an aggressive disposition.

It is in the realm of international procedure that events during the progress of hostilities may be pertinent to the problem of determining the aggressor. The state engaged in hostilities indicates its attitude and its will by its response to the efforts of non-participants to stop the fighting. It is this last type of event which has increasingly been employed on occasions when it actually has been necessary to determine the aggressor.

This test rests on the assumption that *an aggressor is a state which is under an obligation not to resort to force, which is employing force against another state, and which refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation.* ✓

It is believed that this test conforms to both the theory and the practice of the League of Nations in dealing with non-aggression obligations, and also that it conforms to the general requirements of collective action to prevent violence.<sup>23</sup>

### 3. THE LEAGUE'S THEORIES OF AGGRESSION

In its study of the criteria for determining the aggressor, the League of Nations has moved toward three different tests, each adopted for a distinctive use. The first of these tests, conforming with that here proposed, defines the aggressor as the state engaged in hostilities in violation of conservatory

<sup>23</sup> This conforms to the seventh recommendation on American Foreign Policy in the pamphlet issued under the auspices of the Norman Wait Harris Memorial Foundation in November, 1934, which suggested that "The United States urge that agreements be negotiated among the parties to the Pact of Paris that whenever a consultation is begun because of violation or threatened violation of the Pact, it shall be assumed that both parties to the controversy are bound by the Pact to refrain from hostilities and to comply with all resolutions unanimously adopted by the consulting states relating to the stoppage of mobilization, the withdrawal of troops, or an armistice, the votes of the states in controversy not to be counted, and a state shall be entitled to treatment as the innocent victim of aggression only if it scrupulously complies with all such resolutions." (An American Foreign Policy toward International Stability, University of Chicago Press, Public Policy Pamphlet No. 14, p. 30.)

measures recommended by the League. The second test defines the aggressor as the state initiating hostilities by territorial invasion. The third test defines the aggressor as a state which has engaged in hostilities outside its jurisdiction without a defensive necessity.

The first test grew out of the League's efforts to improve its means of preventing war, especially under Article 11 of the Covenant. The second grew out of the League's efforts to define the conception of defense in connection with the legitimate uses of armaments. The third test grew out of the League's efforts to determine responsibility for hostilities of the past. Let us consider briefly the history of these three tests.

It became obvious that measures for preventing hostilities should at first treat both parties alike but that such measures could not succeed if one or both litigants persisted in rejecting all conciliatory and conservatory proposals. Some sanction to prevent such a denouement seemed necessary, and discrimination by other states in their treatment of the litigants according as they did, or did not, accept the League's proposals seems the most available sanction.

Steps to supplement the Covenant and to give effect to these ideas were made at the Assembly of 1924, which had before it a draft convention drawn up by an American group providing that "a signatory refusing to accept the jurisdiction of the court in any such case (of alleged aggression) shall be deemed an aggressor" (Art. 5), and listened to the suggestions of Prime Ministers MacDonald and Herriot that the aggressor is he who refuses to arbitrate.<sup>24</sup> The Geneva Protocol, drawn up by this Assembly, emphasized this theory of aggression (Art. 13, par. 2, ch. 1), but also explicitly included as tests of aggression the violation of provisional measures concerning armaments, mobilization, or other acts likely to render the dispute more acute, enjoined by the Council during the period of pacific procedure (Art. 10, par. 2, ch. 2). In the event of actual hostilities, rejection of an armistice proposed by the Council by a two-thirds vote, or violation of such an armistice, constituted aggression (Art. 10, par. 4).

After rejection of the Protocol, the Council's study of Article 11 resulted in resolutions endorsed by both the Council and the Assembly in 1927 which emphasized the Council's capacity under that article to recommend conservatory measures where there is an imminent threat of war and to recommend coercive measures against a party to the dispute which disregards these recommendations. It also suggested that "If, in spite of all steps here recommended, a 'resort to war' takes place, it is probable that events will have made

<sup>24</sup> Records of the 5th Assembly, 1924, Plenary Meeting, Sept. 4, 1924; 3rd Committee, p. 169. This test appears in Art. 5 of the Locarno Treaty of Oct. 16, 1925, but is at least as old as Thucydides, who wrote "to proceed against one who offers arbitration as against a wrongdoer, law forbids" (Everyman's ed., c. 3, p. 56), quoted by Grotius, II, c. 23, § 8. See also Erasmus, *Institutio Principis Christiani*, c. 11, p. 60; Wolff, *Jus Gentium*, sec. 572; Vattel, II, sec. 333; Eagleton, "The attempt to define aggression," p. 591.

it possible to say which state is the aggressor, and, in consequence, it will be possible to enforce more rapidly and effectively the provisions of Article 16."<sup>25</sup>

The Committee on Arbitration and Security, set up at the initiative of the Dutch representative by the Assembly of 1927 in connection with the Preparatory Commission for the Disarmament Conference, elaborated this idea. The Rutgers Memorandum on Articles 10, 11, 16 of the Covenant presented to this committee, specified among other acts which might constitute aggression "refusal of either of the parties to withdraw its armed forces behind a line or lines indicated by the Council."<sup>26</sup> The Politis Memorandum on Security presented to the same committee, noted the difficulty of designating the aggressor either by unanimous decision of the Council, exclusive of the representatives of the belligerent parties (as in the Locarno Treaty), or by specified presumptive evidence, valid until discounted by unanimous decision of the Council (as in the Geneva Protocol), and suggested:

As a way out of the difficulty, serious consideration should be given to an idea which was mentioned subsidiarily in the Geneva Protocol (Article 10) and was brought up again by the French delegation in the memorandum submitted by it in 1926 to the Preparatory Disarmament Commission.

The solution suggested was to empower the Council, should it not reach unanimity as regards the determination of the aggressor, to order the belligerents to observe an armistice, the conditions of which it was to fix by a two-thirds majority, and to agree that any belligerent refusing to consent to such armistice or violating it should definitively be regarded as the aggressor.<sup>27</sup>

This idea is incorporated in two treaties which grew out of the work of the Committee on Arbitration and Security: the Convention on Financial Assistance, initiated by the Finnish delegate and opened for signature on October 2, 1930, and the General Convention to Improve the Means for Preventing War initiated by the German delegate and opened for signature on September 26, 1931. The first provides for financial assistance to a party which conforms to all "peaceful procedures" and "provisional measures recommended by the Council with a view to safeguarding peace" in serious dispute with another party which "refuses or neglects to conform to such steps" (Art. 2). The other convention imposes an obligation upon the parties "to carry out without delay" conservatory measures, including armistice, proposed by the Council (Arts. 2, 3) and

If any violation of the measures defined in Articles 2 and 3 is noted by the Council and continues in spite of its injunctions, the Council shall

<sup>25</sup> League of Nations Monthly Summary, Oct. 1927, Vol. 7, p. 308; Jan. 1928, Vol. 7, pp. 356, 376-378; Conwell-Evans, *The League Council in Action*, Oxford, 1929, pp. 282-285.

<sup>26</sup> Documents of the Preparatory Commission of the Disarmament Conference, Series VI, L. of N., Disarmament. 1928. IX. 6, p. 142 ff, par. 117 (e), Eagleton, *Int. Con. No. 264*, p. 648.

<sup>27</sup> *Ibid.*, p. 132 ff, par. 79; Eagleton, *Int. Con. No. 264*, p. 647.

consider what means of all kinds are necessary to insure the execution of the present convention. Should war break out as a consequence of this violation, such violation shall be regarded by the high contracting parties as *prima facie* evidence that the party guilty thereof has resorted to war within the meaning of Article 16 of the Covenant. (Art. 5.)<sup>28</sup>

Let us now consider the test of aggression as priority in violation of territorial integrity. This test is suggested by Article 10 of the Covenant, but the interpretation of this article has given rise to great difficulty because it was not certain whether territorial integrity was violated by invasion of territory without intention of annexation, as claimed by Greece in the Corfu incident, or only by annexation of the territory, or invasion with that intention, as claimed by Italy in that incident.<sup>29</sup> Furthermore, it was not certain whether a state was entitled to the integrity of the territory it occupied *de facto* at the time the incident arose, or only to the territory of which it had *de jure* title at that time.<sup>30</sup>

These differences, as well as the political objection of certain countries (manifested by the proposed United States Senate reservation to the Covenant and the Canadian resolution of 1923) to assume responsibility for preserving the territorial *status quo* in Europe, have prevented a clear interpretation of Article 10.<sup>31</sup> Nevertheless, the conception of territorial invasion has figured in various discussions of aggression. This conception was minimized in the Geneva Protocol which, however, included as aggressions, resorts to war in violation of the Covenant, including Article 10, and violation of a demilitarized zone. (Art. 10, par. I.)

The Rutgers Memorandum narrated as acts which would in many cases

<sup>28</sup> For texts of these conventions see L. of N. Official Journal, Vol. 11, p. 1649; Vol. 12, Spl. Supp. No. 92, p. 24, and Myers, "World Disarmament," World Peace Foundation, pp. 337-355.

<sup>29</sup> Wright, Q., "The Neutralization of Corfu," this JOURNAL, Vol. 18 (1924), p. 107.

<sup>30</sup> Sir John Fischer Williams (Chapters on Current International Law and the League of Nations, London, 1929, pp. 463-469), believes that Art. 10 protects the state in actual possession or seisin against forcible disseisin even by a state which eventually may prove to have better title. Art. 10 was not applicable in the Mosul Case because Turkey was not a member of the League, but in that case Great Britain took the position that Turkey was bound to respect the actual British line of occupation, whereas Turkey assumed that no objection could be made to any action she might take beyond that line in territory which was hers before the war and which she had never renounced. The Laidoner Commission sent to investigate hostilities in the vicinity of the "Brussels Line" found its activities hampered by this Turkish attitude, but the Wirsén Commission sent to report on the general question gave some support to the Turkish contention (L. of N., Question of the Frontier between Turkey and Iraq, 1925, pp. 84-85). The League Council, however, held that Turkey had by the Treaty of Lausanne renounced title to territory beyond the line to be fixed by the Council. See Conwell-Evans, *op. cit.*, pp. 108-109; Wright, "The Mosul Dispute," this JOURNAL, Vol. 20 (1926), p. 455.

<sup>31</sup> Williams, Sir J. F., Some Aspects of the Covenant of the League of Nations, 1934, pp. 102-125; Scott, J. B., "Interpretation of Article X of the Covenant," this JOURNAL, Vol. 18 (1924), pp. 108-113.

constitute acts of aggression, the invasion of the territory of one state by troops of another state; an attack on a considerable scale, launched by one state on the frontiers of another state; a surprise attack by aircraft carried out by one state over the territory of another state, with the aid of poisonous gases. "The presence of armed forces of one party in the territory of another" might also, in the opinion of this memorandum, serve as a basis for determining the aggressor.<sup>32</sup>

As the Disarmament Conference proceeded, it became clear that a program of armament limitation required a distinction between the legitimate and illegitimate purposes of armaments, and in accordance with President Hoover's suggestions of the summer of 1932, the former was divided into a police and a defense component.<sup>33</sup> Armament-building programs, however, especially naval armament programs, had often been supported by allegations of a need to defend not only the state's territory but also the state's foreign commerce, citizens abroad and foreign policies. It was clear that if any state were allowed armaments sufficient to defend all of these, it would have enough to conquer most of its neighbors. Thus it was seen that an armament program, aimed at promoting general security, must limit the conception of defense to territorial defense. It would be possible to allow every state armaments sufficient to defend its territory without giving it enough easily to attack its neighbors. Defense from this point of view being conceived as territorial, aggression was naturally conceived as territorial invasion, and on May 27, 1933, the American delegation at the Disarmament Conference proposed as a definition of the aggressor "one whose armed forces are found on alien soil in violation of treaties."<sup>34</sup>

This conception had been elaborated by the Soviet delegation in a definition of aggression submitted to the conference on May 24, and was the basis of the Litvinoff treaty defining aggression concluded by the Soviet government and most of its neighbors in the summer of 1933. This definition included not only invasion by armed forces of the territory of another state, but also the declaration of war, attacks by armed forces on naval vessels or aircraft, naval blockades, and aid to armed bands invading foreign territory. Thus it identified aggression with an unprovoked "act of war" although the latter conception was broadened to include toleration of filibustering expeditions.<sup>35</sup> It also specified that "no consideration of political, military, economic or any other nature can serve as an excuse or justification of aggression," as thus specified.<sup>36</sup> This definition makes it clear that territorial invasion, even

<sup>32</sup> *Supra*, note 26.

<sup>33</sup> Department of State Press Releases, June 25, 1932, pp. 593-4.

<sup>34</sup> *Ibid.*, May 27, 1933. See Harris Foundation, *An American Foreign Policy toward International Stability*, Chicago, 1934, pp. 13-22.

<sup>35</sup> See Wright, "Changes in the Concept of War," this JOURNAL, Vol. 18 (1924), pp. 758-9; *Current History*, June, 1924, Vol. 20, p. 457 ff.

<sup>36</sup> Korovine, E. A., "The U. S. S. R. and Disarmament," *International Conciliation*, 1933, No. 292, pp. 349-354; U. S. Treaty Information Bulletin No. 47, August, 1933, p. 39 ff.

without intent to annex the territory, is aggression, but it does not solve the problem presented by territory occupied by one state and claimed by another. In the Chaco dispute, Paraguay and Bolivia each claimed that it was only seeking to defend its own territory. Until the territorial limits of all states are more precisely defined than they are today, reliance on this definition will often be useless for determining the aggressor with sufficient speed to be of value in preventing violence.

As a general conception of defense for purposes of estimating a state's armament requirements, this conception is doubtless valuable, and as evidence of aggression in parts of the world with well-defined boundaries, it may also be of value. But for implementing non-aggression treaties the League has found this test of limited use. A state should not be able to defend itself from charges of aggression by alleging that its military operations are to pacify or to defend territory which it claims but has not recently possessed. The fighting must stop before this claim can be determined, and for this purpose the definition of aggression based on willingness to accept a stop-fight invitation, an armistice, or other conservatory measures has been found adequate.

The third test of aggression or the extra-jurisdictional use of armed force without defensive necessity has arisen in connection with claims for reparation of losses arising from hostilities. For this purpose there is no need of a test which is rapidly applicable in time of tension or which will distinguish between legitimate types of military preparation in time of peace. The test is to be applied by a juridical body in the calm after the hostilities are over. The test should embody that justice which requires that due weight be given to all the facts of the situation as it appeared or reasonably should have appeared to the litigants at the time.<sup>37</sup> Such a test is difficult to state briefly; in fact an attempt to state it briefly may be unsafe because it is important that due weight be given to the unusual mitigating or aggravating circumstances which could not have been thought of before the event. It is in connection with a test for this purpose that Sir Austen Chamberlain warned against definitions of defense or aggression which might be "a trap for the innocent and a signpost for the guilty."<sup>38</sup> The question here is not that of the con-

<sup>37</sup> The Rumboldt Commission on the Bulgarian-Greek frontier incident (*supra*, note 19), wrote, "In order to obtain a correct view of the decision (of the Greek Government to send its army across the Bulgarian frontier on October 20, 1925) it is necessary to get back to the atmosphere which prevailed at the time, determine as accurately as possible the circumstances in which the news from Demir-Kapu was received in Athens and the effect which this news produced on the minds of the members of the Greek Government" (p. 5). The Lytton Commission on the Manchurian incident (*supra*, note 19) in finding that the operation of the Japanese troops during the night of September 18-19, 1931 "cannot be regarded as measures of legitimate self-defense" did not "exclude the hypothesis that the officers on the spot may have thought they were acting in self-defense." (p. 71.)

<sup>38</sup> Quoted by Secretary Kellogg in address, New York Council on Foreign Relations, March 15, 1928, reprinted in *The General Pact for the Prevention of War*, text of the Pact as

formability of behavior to a preëstablished rule but of conformability to the standard of reasonable behavior in circumstances which are alleged to have made strict observance of the rule unreasonable. The term defense has tended to be used to cover all of the unnamed circumstances which should extenuate the strict application of the rule against force.

Obviously if the plea of "defense" is to have this broad purpose, it must be in some way limited or it can be used to eliminate all responsibility for violations of no-force obligations. These limitations have taken two forms, first of which is the recognition that although immediate power to take defensive action is inherent in sovereignty, it always belongs to international procedure eventually to determine whether in a particular situation this power was exercised within the "right of self-defense" as it exists in international law. States have refused to regard measures injurious to them, taken in alleged self-defense, as within the domestic jurisdiction of the state but have habitually made diplomatic protests and demands for reparation;<sup>39</sup> claims for damages resulting from such measures have often been submitted to and allowed by arbitral tribunals,<sup>40</sup> and the League of Nations has habitually assumed that it was competent to determine the justifiability under the Covenant of resorts to force alleged in self-defense.<sup>41</sup> States can judge of the expediency of resort to force in self-defense in an emergency, but such a judgment does not determine the legal justifiability of the measures taken

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signed, notes and other papers, U. S. Government Printing Office, 1928, p. 64. In his note of June 23, 1928, Secretary Kellogg had written "It is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition." Treaty for the Renunciation of War, Text of the Treaty, Notes Exchanged, Instruments of Ratification and of Adherence and other papers, U. S. Government Printing Office, 1933, p. 57.

<sup>39</sup> Wright, "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), p. 44; Moore, Digest of International Law, Vol. 2, Sec. 215, Vol. 7, Secs. 1092, 1093; Sir John Simon, British Foreign Minister, Feb. 18, 1932, British Parliamentary Debates, Commons, Vol. 261, p. 1830, quoted this JOURNAL, Vol. 26 (1932), p. 586. This is an application of the general principle that "the responsibility of a state is determined by international law or treaty anything in its national law (including executive declarations) to the contrary notwithstanding." (Harvard Research, Draft Code on Responsibility of States, Art. 2, this JOURNAL, Spl. Supp., April, 1929, p. 142; see also Conference for the Codification of International Law, League of Nations, 1929, Vol. 3, pp. 19, 30, 55.)

<sup>40</sup> See cases cited in Harvard Research, *op. cit.*, pp. 196-197; Wright, "Responsibility for Losses in Shanghai," this JOURNAL, Vol. 26 (1932), p. 589.

<sup>41</sup> M. Politis, speaking in connection with the Corfu incident, expressed the opinion of the Council of the League when he said: "I am aware that in an official communiqué published, I believe yesterday at Rome, the acts of violence which have just been committed against Greece are described as pacific acts of a temporary character. It does not seem to me that it lies with the author of an act to describe it. Acts must be judged objectively, and it is for the Council to judge the acts regarding which Greece has the right to complain." League of Nations Official Journal, Vol. 4, p. 1277. See also Wright, "Opinion of Commission of Jurists on Janina-Corfu Affair," this JOURNAL, Vol. 18 (1924), pp. 541-2, and *infra*, notes 43, 44, 45.

which is to be determined by whatever international procedure—diplomacy, conciliation, arbitration, resort to the League of Nations or to the Permanent Court of International Justice—has been established by the parties for settling their disputes. The preliminary correspondence and practice under the Pact of Paris are consistent with this view.<sup>42</sup> A dispute as to the responsibility for losses resulting from a use of force, even when a defensive necessity is alleged, can, among parties to the Pact, only be settled by “peaceful means.”

Secondly, certain classifications of the circumstances which should be examined in such an international consideration of the plea of defense have developed by precedent. In connection with the Corfu dispute,<sup>43</sup> the Greco-Bulgarian dispute<sup>44</sup> and the Manchurian dispute<sup>45</sup> the League of Nations has

<sup>42</sup> Wright, “Meaning of the Pact of Paris,” *loc. cit.*, pp. 42-47.

<sup>43</sup> In the Corfu affair the Committee of Jurists gave a very circumspect answer to the question whether “measures of coercion which are not meant to constitute acts of war are consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles.” Without referring to either “defense” or “reprisals”, the commission said such measures “may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.” (This JOURNAL, Vol. 18 (1924), pp. 537, 541.)

<sup>44</sup> The Rumboldt Commission on the Bulgarian-Greek frontier dispute made a detailed examination of the incidents, state of opinion, military orders and political intentions leading up to and immediately following the Greek invasion of Bulgarian territory on Oct. 20, 1925, with the conclusion that the “Greek command really feared an invasion in force of its territory” and “had in view merely an operation with limited objectives;” that the Greek Government was “quite naturally alarmed” at the news, and the exaggerated reports of the Demir-Kapu incident in which a Greek officer under flag of truce was killed; that it was impossible to establish who shot first in this incident or the circumstances in which the parlementaire was killed; that “the Bulgarian Government acted in conformity with the Covenant of the League of Nations and that the fact that Bulgarian soldiers at Demir-Kapu may have at one moment penetrated a few yards into Greek territory cannot be held to be a violation of the territorial integrity of Greece;” and that, in spite of the extenuating circumstances, “by occupying a part of Bulgarian territory with its military forces, Greece violated the Covenant of the League of Nations.” Consequently the Greek claim for reparation was denied and the Bulgarian claim allowed. (Document cited *supra*, note 19, pp. 7-8.)

<sup>45</sup> The Lytton Commission on the Manchurian incident stated the Japanese and Chinese view of the incident of the night of Sept. 18-19, 1921, and the sources of its own information, and concluded that “tense feeling” existed between the Japanese and Chinese military forces, that the Japanese on that night put a “carefully prepared plan” into operation with “swiftness and precision” while the Chinese “had no plan” and “were surprised” by the Japanese attack, that an explosion occurred “on or near the railroad between 10 and 10:30 p.m. on September 18th, but the damage, if any, to the railroad did not in fact prevent the punctual arrival of the south-bound train from Changchun, and was not in itself sufficient to justify military action. The military operations of the Japanese troops during this night, which have been described above, cannot be regarded as measures of legitimate self-defence. In saying this, the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self-defence.” (Document cited *supra*, note 19, pp. 67-70.) The commission, however, made no recommendations for reparations.

had to deal with defense in this sense and, while avoiding definitions, its practice, together with earlier precedents such as the Caroline incident, suggests that "the plea of defense will justify otherwise illegal action only if the action was taken to prevent an immediately impending, irreparable injury and for that purpose alone."<sup>46</sup> Thus aggression, in the sense of any use of force carrying liability for the damages caused thereby, occurs whenever force is used contrary to a no-force obligation if the object is something other than the prevention of injury (remedy of a past injury for instance); or if the injury which the action was intended to prevent was remote or speculative rather than immediately impending; or if that injury would not have been irreparable but was of a type to be remedied by pecuniary or other compensation; or if the force used was beyond that required to prevent the injury.

Such a classification of the particular circumstances to be ascertained and weighed in determining responsibility for injuries arising from hostilities has proved useful in settling claims after the event, and doubtless the accumulation of precedents by international courts, commissions or institutions competent to deal with such cases would in itself act as a deterrent to aggression, but for purposes of preventing or stopping hostilities in a given crisis this test of aggression is useless. Before these circumstances can be ascertained and weighed the opportunity for influencing events will have passed.

#### 4. THE LEAGUE'S TEST OF AGGRESSION IN CRISES

In practice, the League's procedure when confronted by active or threatened hostilities, has been to summon as expeditiously as possible a meeting of the Council, which forthwith dispatches an invitation to both parties to stop fighting. In most cases, including the Greco-Bulgarian affair of 1925, the Mosul affair of 1925, the Shanghai affair of 1932, and the Leticia affair of 1932, this procedure has resulted in a suspension of hostilities and an eventual pacific settlement of the controversy.<sup>47</sup> In the Manchurian and the Chaco affairs, however, the same procedure was resorted to but without success.

In the Manchurian affair, the Assembly's resolution of February 24, 1933,

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While the Lytton Commission did not deal with responsibility for the Shanghai affair of January and February, 1932, the report of the Consular Committee of Inquiry set up in Shanghai under authority of the League of Nations, in which the American consul participated, pointed out that the mayor of Greater Shanghai had accepted the Japanese demand and the Japanese consul had informed the consular body of the receipt of this reply, which he said was entirely satisfactory, before the bombardment began. (League of Nations Reports of Committee of Inquiry set up in Shanghai, Political, 1932, 74, p. 2.) On the principles governing responsibility in this affair, see Wright, "Responsibility for Losses in Shanghai," this JOURNAL, Vol. 26 (1932), pp. 536-590.

<sup>46</sup> Wright, "Meaning of the Pact of Paris," *loc. cit.*, pp. 44-47, 54-57; "The Outlawry of War," this JOURNAL, Vol. 19 (1925), pp. 89-91.

<sup>47</sup> Conwell-Evans, *The League Council in Action, 1929*, deals with all of the cases before 1929. On the Shanghai affair, see Lytton Commission Report (L. of N., Political, 1932, VII, 12, pp. 84-88), and on the Leticia affair, Report adopted by the Council, March 18, 1933, Hudson, "The Verdict of the League, Colombia and Peru at Leticia," *World Peace Foundation, 1933*, p. 29 ff.

implied that Japan was the aggressor because of its failure to carry out the Council's resolutions of September 30 and December 10, 1931, adopted under Article 11 of the Covenant and accepted by Japan. These resolutions required Japan to withdraw troops into the South Manchuria Railway zone as rapidly as defensive necessities permitted.

It is indisputable that without any declaration of war a large part of Chinese territory has been forcefully seized and occupied by Japanese troops and that in consequence of this operation it has been separated from and declared independent of the rest of China.

The Council in its resolution of September 30, 1931, noted the declaration of the Japanese representative that his government would continue as rapidly as possible the withdrawal of his troops, which had already been begun, into the railway zone in proportion as the safety of the lives and the property of Japanese nationals was effectively insured, and that it hoped to carry out this intention in full as speedily as might be. Further, in its resolution of December 10, 1931, the Council, reaffirming its resolution of September 30, noted the undertaking of the two parties to adopt all measures necessary to avoid any further aggravation of the situation and to refrain from any initiative which might lead to further fighting and loss of life.

It should be pointed out in connection with these events that under Article 10 of the Covenant, the members of the League undertake to respect the territorial integrity and existing political independence of all members of the League.

Lastly under Article 12 of the Covenant, the members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or inquiry by the Council.

While at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to lie on one side and the other, no question of Chinese responsibility can arise for the development of events after September 18, 1931.<sup>48</sup>

In the Chaco dispute the Assembly committee in its report of January 16, 1935, implied that Paraguay was the aggressor because she had refused to accept while Bolivia had accepted the Assembly's resolution under Article 15 of the Covenant of November 24, 1934, calling for an armistice and the institution of a procedure for pacific settlement of the controversy.

According to paragraph 6 and 10 of Article 15 of the Covenant, since the Assembly's report which was unanimously agreed to, the members of the League may not go to war with the party to the dispute which complies with the recommendations of the report. In consequence of Bolivia's acceptance of the Assembly's recommendation, Paraguay must refrain from resorting to war with Bolivia, in so far as the latter complies with the conclusions contained in the report of the Assembly.

Having regard for the situation set out above, the Advisory Committee informs those members of the League who had taken steps to prohibit

<sup>48</sup> *Supra*, note 13.

the supply of arms to Bolivia and Paraguay that, in its opinion, this prohibition should not continue to be enforced against Bolivia. In so far as it continued to be enforced, the members of the League:

1. Should supplement the measures already adopted by any other measure which may be required to render the existing measures more effective, and in particular by the prohibition of the reexport or through transit of war materials;

2. Should not, as a general rule, authorize the export of war materials except to governments or to properly accredited agents of governments.<sup>49</sup>

##### 5. GENERAL APPLICABILITY OF PROPOSED TEST

The difficulty in applying this formula as a general test of aggression for purposes of preventing hostilities lies in the final clause. Most states are under obligation not to resort to force in all or most circumstances under either the Pact of Paris or the Covenant. It is seldom difficult to determine whether armed force is actually being employed. It also is not difficult to determine whether the proposed armistice has been accepted, and, in case an impartial commission has been dispatched to the spot, whether it is being observed. But has the armistice been proposed in accordance with a procedure which the assumed aggressor has accepted to implement its no-force obligation?

It is clear that members of the League have agreed not to go to war against a member that has accepted an armistice recommended in a report under Article 15, paragraph 6. Consequently, there was no doubt that Paraguay was the aggressor after refusing to accept the Assembly's report of November 24, 1934, which had been accepted by Bolivia.

While the League Council or Assembly can also recommend an armistice or other provisional measures under Articles 10, 11 and 17, acceptance of such recommendations is not obligatory. The Geneva Protocol and the General Convention for Improving the Means of Preventing War create obligations among the parties to accept such provisional measures for the preservation of peace. There would therefore be no difficulty in attaching the juridical consequences of aggression to parties to these conventions which rejected an armistice thus proposed.

The Pact of Paris contains no explicit procedure for making such recommendations, but it has been held by the United States that consultations to prevent war is implicit in the Pact.<sup>50</sup> It cannot, however, be said that the parties to the Pact are juridically obliged to accept an armistice or other provisional measure proposed by states engaged in such consultation. Nevertheless it is believed that parties to the Pact would be juridically protected if

<sup>49</sup> *Supra*, note 2.

<sup>50</sup> See Norman Davis' Statement at Disarmament Conference, Press Releases, May 27, June 3, 1933; Harris Foundation, *op. cit.*, pp. 25-26; Johnstone, Anne Hartwell, "The United States and the Principle of International Consultation," National League of Women Voters, New York, 1934.

they treated as an aggressor a state which rejected such armistice, and similarly that members of the League would be juridically protected if they treated as an aggressor a member which rejected an armistice proposed by the League authorities under Articles 10 or 11.

This conclusion does not convert a recommendation into a judgment. A recommendation of the consulting states does not determine who is the aggressor, but invites both to stop fighting. The judgment is made not by the consulting body, but by each state individually as a result of presumptions arising from the responses of the belligerent states to this invitation. Whether a party to one of these conventions, which discriminated against another party found by this process to be an aggressor, could defend itself against claims of reparation for discrimination contrary to the customary law of neutrality, would depend upon whether this test of aggression appealed to the arbitral or judicial tribunal seized of the case as carrying out the intention of the no-force treaty. If it did, the discrimination would be what the aggressor had agreed to in ratifying that treaty and his claim would be rejected.<sup>51</sup> The intention of the no-force treaty is to prevent or stop resort to violence in international relations. It would seem, therefore, that a test of aggression which depends upon the disposition of the parties to stop fighting at any moment accords with this intention. If the intention of the treaty were to enforce international law, or to assure the arbitration of all disputes, a different test might be necessary to determine whether it had been violated, but the conception of aggression is liability for violation of a treaty whose object is the prevention of resort to force.

Furthermore, the fact that fighting is in progress creates a presumption that both sides have violated the treaty. And it is difficult to see what better evidence could be found to relieve the state of this presumption than its manifestations of a willingness to stop fighting. Conversely, refusal to accept the invitation to stop hostilities would confirm the initial presumption of aggression.

If both parties accept the invitation, then fighting will stop, and it will be unnecessary to determine who is the aggressor for purposes of prevention. Subsequent claims for reparations for damages because of unjustifiable hostilities can be settled but with a different test for justifiability.<sup>52</sup> If neither party accepts the invitation, then the presumption that both are aggressors continues, and no occasion for discriminatory treatment arises.

If we admit the conformity of this test to the intention of non-aggression treaties, is it practically applicable and would its application give substantial justice in all circumstances?

The practicability of this test has been demonstrated in the instances re-

<sup>51</sup> The other parties could also justify such discrimination on grounds of reprisal. Q. Wright, "The Meaning of the Fact of Paris," *this JOURNAL*, Vol. 27 (1933), pp. 59-60. See also Budapest Articles of Interpretation, *supra*.

<sup>52</sup> The third test of aggression discussed above.

ferred to. There has been little difficulty in determining whether one or both of the parties have or have not accepted the proposed armistice, and if they both have, a commission sent to the spot has found it possible to determine whether they are carrying it out. With this test no historical documents need be examined, no difficult facts as to the time at which operations began need be ascertained, but only observations of present facts. Was the armistice accepted? And if so, Is it being carried out? The technical advantage of hinging the test upon present rather than past facts is obvious.

But does the test give substantial justice? Clearly the terms of the armistice at the time at which it is proposed will have an important influence upon the position of the parties. If A and B are disputing about the title to a territory in the possession of A, and fighting begins on its frontiers, then an immediate armistice withdrawing both troops an equal distance behind the lines of *de facto* occupation will give A the advantage of still occupying some of the disputed area. It would, however, have no more advantage than if there had been no fighting, and the assumption of all treaties for the prevention of violence is that justice thrives better without than with fighting.

Suppose, however, that fighting has resulted in B's troops pressing A back a considerable distance. Then an armistice based upon a withdrawal behind the *de facto* line before fighting began would probably be resented by B, because it would deprive it of the advantage gained by its arms. But as the very object of the non-aggression treaty is to eliminate such advantages, it could claim no injustice. The enforcement of such an armistice would, however, be difficult because it would require not merely the separation of troops at the point where they are, but a definite evacuation of occupied territory.

If, on the other hand, the armistice in such circumstances is based on the line of battle at the time it is made, A could probably complain that it was denied the protection it was entitled to expect from the non-aggression treaty. This was, however, the proposal made in the resolution of the League Assembly on the Chaco affair on November 24, 1934, and it was Bolivia, whose forces had been driven back, that accepted while Paraguay whose *de facto* gains were in a measure recognized by the armistice, rejected. The reason was clear: Paraguay, having gained something, expected that her arms could gain more, whereas Bolivia thought it advantageous to avoid further losses, even though dispossessed of territory which she had once occupied.<sup>53</sup>

If fighting has been going on sporadically a considerable time before the armistice is proposed, the difficulties are multiplied. If State B has occupied much of the territory it claims and has been there for several months, it can well ask, "Why should the armistice be based upon the *de facto* line of six months ago, which it thought unjust, rather than upon the *de facto* line at present, even though A thinks the latter unjust?" While in principle, it would seem that the most satisfactory criterion would be an armistice based

<sup>53</sup> Assembly report on the dispute between Bolivia and Paraguay, Nov. 24, 1934, par. 12 (ii), *supra*, note 2.

upon the *de facto* line at the time the episode began, probably in practice it would have to be based upon the line of battle at the time the armistice was proposed.

These considerations indicate that to conform to substantial justice the armistice should be proposed before the fighting has resulted in any substantial change in the *de facto* line of occupation, and should be based on that line. Speed is the essence of success. Doubtless a delay in applying this test, due to well known circumstances, was one of the main reasons for the failure of collective action in the Manchurian and Chaco disputes. In the Manchurian case a commission did not arrive in Manchuria to determine whether Japan was actually complying with the Council's resolution of September, 1931, until Japan was in occupation of the whole of Manchuria.<sup>54</sup> In the Chaco dispute, due to the complication of various international bodies handling the affair, the League did not make a definite armistice proposal until fighting had been going on for several years.<sup>55</sup>

In each of these cases the state found to be an aggressor almost immediately expressed an intention to withdraw from the League of Nations, justifying its action by the allegation that it had not been found guilty on the basis of events which occurred before or at the time hostilities began. Japan's note of March 27, 1933, gave as its reason for withdrawal, "the arbitrary conclusion" of the League, "ignoring alike the state of tension which preceded and the various aggravations which succeeded the incident" of September 18, 1931, that this incident "did not fall within the just limits of self-defense."<sup>56</sup> This argument of course ignored the real grounds for considering Japan the aggressor, namely, that she had failed to carry out the League's resolutions providing for a cessation of hostilities to which Japan herself had agreed on September 30 and December 10, 1931, but the long delay in finding that Japan had thus failed gave a certain plausibility to her argument.

Likewise Paraguay, in her note of February 24, 1935, expressing an intention to withdraw from the League, suggested that the League had "constantly evaded entering upon an investigation which would establish the responsibility for (the initiation of) the war" and that "the prohibition to resort to war is only applicable under the Covenant when the conflict has not yet developed into an armed struggle."<sup>57</sup> This argument seems to imply that after hostilities have begun states are relieved of all obligations not to fight, which certainly would be hard to justify either from the texts or from reason, but nevertheless the long delay in finding an aggressor while hostilities went on

<sup>54</sup> Wright, Q., "Collective Rights and Duties for the Enforcement of Treaty Obligations," *Proc. Am. Soc. Int. Law*, 1932, p. 110.

<sup>55</sup> *Supra*, note 2.

<sup>56</sup> *League of Nations Monthly Summary*, March, 1933, Vol. 13, p. 84.

<sup>57</sup> *Ibid.*, February, 1935, Vol. 15, p. 30. The Czechoslovak representative proposed at the meeting of the advisory commission on March 11, 1935, to submit to the Permanent Court of International Justice the question of who was the "original aggressor" in the Chaco dispute. (Geneva, March, 1935, Vol. 8, p. 30.)

lent a certain plausibility to it. "A technical and automatic definition" of aggression, such as that here proposed, is "necessary" and is not "contrary to justice or impracticable," but it may appear to be so unless applied rapidly.<sup>58</sup>

While it is believed that the test of aggression here proposed conforms to the standards of practicability and justice, it cannot be applied satisfactorily without discretion. While it is as automatic as may be in the varied conditions of international relations, a test applicable with mechanical precision cannot be expected. The body proposing the armistice can not merely order the parties to stop fighting. It must propose a line of separation, provide a commission for observing the withdrawal of troops behind that line, and act rapidly, always with due consideration to the military problems of transport and terrain, in determining the period necessary for withdrawal. While the line of battle at the time would probably have to be given primary consideration, various tests of aggression should be in mind in formulating the terms of the armistice. What was the respective attitude of the parties toward pacific settlement of the dispute before hostilities began? Who first violated the *de facto* frontier? Which was best prepared with an offensive strategy? Such questions, if easily answered, might be given weight in determining the terms of the armistice. It is believed, however, that the basic test of aggression must be the attitude and behavior of the parties in response to the armistice after it is presented.

If we put our definition of aggression from the standpoint of criteria, in relation to our definition from the standpoint of consequences, we arrive at the following proposition, which may be the basis for the future law respecting the behavior of non-participants upon the outbreak of hostilities:

*A state which is under an obligation not to resort to force, which is employing force against another state, and which refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation, is an aggressor, and may be subjected to preventive, deterrent or remedial measures by other states bound by that obligation.*

<sup>58</sup> Lauterpacht, H., *The Function of Law in the International Community*, 1933, p. 82. See also note 15, *supra*.

## THE CITIZENSHIP OF NATIVE-BORN AMERICAN WOMEN WHO MARRIED FOREIGNERS BEFORE MARCH 2, 1907, AND ACQUIRED A FOREIGN DOMICILE

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For a long time it has been asserted by the Department of State and to a more limited extent by the Department of Labor that a native-born woman who married a foreigner prior to March 2, 1907, and thereupon acquired a foreign matrimonial domicile, lost her American citizenship.

The legal validity of this conclusion is open to serious question. It does not rest on statute, nor even on clear judicial authority. It appears primarily to be an Executive determination, apparently relying upon the view that when the woman marries a citizen of a country with which the United States has a naturalization treaty, and by the municipal law of his country acquires his citizenship therein, that the marriage constitutes a form of naturalization and that the treaty requires the United States to recognize it as such.

The Immigration and Naturalization Service of the Department of Labor has taken the view that there is no loss of citizenship by virtue of marriage of an American woman to an alien prior to March 2, 1907, unless the following elements are present:

- (1) Marriage was to a so-called "treaty national," that is, a citizen or subject of a country with which the United States has a naturalization treaty containing reciprocal provisions that each country party to the treaty will recognize a person, originally one of its citizens or subjects, to be a citizen or subject of the other upon being duly naturalized therein in accordance with its laws;

- (2) Emigration of the citizen wife to the jurisdiction of the husband's nationality; and

- (3) The law of that country then provided that marriage of an alien woman to one of its citizens or subjects conferred allegiance of the husband upon the wife.<sup>1</sup>

Apart from the fact that this view makes the loss of American citizenship depend on the particular country of which the husband is a national and on the particular country in which the matrimonial domicile is established, it is believed to be an error to infer that the Bancroft and subsequent naturalization treaties considered mere marriage and residence abroad as a form of naturalization, the recognition of which was required by the treaty. The naturalization therein referred to involved a definite, formal renunciation of

<sup>1</sup> Lecture No. 27, 2nd ser., December 17, 1934, p. 4.

original citizenship accompanied by compliance with a number of formalities, including an oath of allegiance and other conditions, technical proceedings which are rarely present when marriage is contracted. The contemporary evidence between 1865 and 1873 indicates that marriage of an American woman to a foreigner was not deemed by the United States a form of naturalization, nor does it appear that the courts so regarded it. If the term "treaty national" is applied to an American woman who married a national of a country with which the United States has a naturalization treaty, it would seem to have evolved from Executive determination, not only without statutory support but, it would seem, in direct conflict with the Act of 1855,<sup>2</sup> which provides only that *foreign* women who married American citizens acquire American citizenship, but intentionally avoids any suggestion of the converse proposition that an American woman who marries a foreigner thereby acquires his nationality.<sup>3</sup>

The vulnerability of the Executive construction of "treaty national" seems further attested by the fact that after the Act of September 22, 1922, the construction was abandoned,<sup>4</sup> although the naturalization treaties were still in force and foreign countries, were the Executive view sound, could presumably still lay claim to their matrimonially acquired citizens and exact recognition thereof from the United States.

#### THE NATURALIZATION TREATIES

The United States naturalization treaties had their beginning with the treaties concluded around 1868, commonly known as the Bancroft treaties. Not all of them read alike. It had long been a problem for the United States to obtain recognition of the principle that foreign countries should renounce

<sup>2</sup> R. S. 1894.

<sup>3</sup> Sec'y. Fish, Feb. 24, 1871, after observing that by the law of England and the United States an alien woman marrying a national acquired her husband's nationality, added: "But the converse has never been established as the law of the United States, and only by the act of Parliament of May 12, 1870, did it become the British law that an English woman lost her quality of a British subject by marrying an alien." He held that an American-born widow of a non-resident alien remained legally a citizen of the United States, but thought it "judicious" to withhold a passport unless she intended to resume her residence in the United States. In 1871 it was still thought desirable, owing to Civil War memories, for an American citizen to remain at home.

Mr. Fish in 1875 reiterated his view that citizenship was not lost by marriage and residence abroad, though protection might be. Letter to Mr. Williamson, Sept. 22, 1875, Moore's Digest, III, 451.

Secretary Bayard adhered to the precedent established by Secretary Fish. *Ibid.*

<sup>4</sup> See Opinion of Attorney General to Secretary of Labor, Aug. 3, 1933, in case of Mrs. Marion Thorgaard. It was there held that American citizenship does not terminate, notwithstanding the fact that the foreign country concerned is a country with which the United States has a naturalization treaty and under its laws its citizenship is conferred on her. Moreover, under the naturalization treaties the matrimonial domicile should be immaterial, whereas there has been Executive concurrence in the view that citizenship is not lost when the matrimonial domicile remains in the United States.

their claims to exact military service from persons born within their allegiance, but who subsequently became naturalized as citizens of the United States, and then returned temporarily to the native country. After long negotiations, the first naturalization treaty was concluded with the North German Confederation on February 22, 1868,<sup>5</sup> and with other German states shortly thereafter. These treaties provide that citizens of the respective countries who become naturalized citizens of the other and shall have resided uninterruptedly in the territory of the naturalizing country for five years, shall be deemed to be citizens of the naturalizing country "and shall be treated as such." Similar treaties were concluded with Belgium, the Scandinavian countries and Great Britain between 1868 and 1872. Some of these treaties are slightly more liberal than the German treaties in that they dispense with the requirement of five years' residence, but recognize naturalization in the other country according to its laws, some of which permit of naturalization short of a five-years' residence.<sup>6</sup> France, Italy, Switzerland, Russia and other European countries have declined to enter into such treaties.

In no part of the contemporary history or interpretation of the treaties does it appear that marriage was even remotely considered as the kind of naturalization that the treaties had in view. While women were slowly obtaining recognition for their civil rights, they had not yet aspired to military glory or been subjected to military service. In the instructions to and dispatches from Ministers Wright and Bancroft<sup>7</sup> it appears that the problem in the mind of the American Executive, whence the treaties derived their inspiration, was to obtain from the countries of emigration a recognition that formal American naturalization was to be deemed a certificate of release from military duties to the native country; and while the treaties used the word

<sup>5</sup> Malloy, II, 1298.

<sup>6</sup> British Treaty, Art. I, reads "naturalized according to law."

<sup>7</sup> For. Rel. 1865, III, 66-68, 76; 1866, II, 2, 10, 12, 13; 1867, I, 574, 583, 587, 591, 596; 1868, II, 40-58. See also H. Ex. Doc. 245, 40th Cong. 2d Sess., Treaties with German States, reprinting diplomatic correspondence; Sen. Ex. Doc. 51, 40th Cong. 2nd Sess., containing report of the Secretary of State, embodying Bancroft's explanation, and reporting Bismarck's interpretation in the Diet: "The literal observance of the treaty includes in itself that those whom we are bound to acknowledge as American citizens cannot be held to military duty in North Germany. That is the main purpose of the treaty—whosoever emigrates *bona fide* with the purpose of residing permanently in America, shall meet with no obstacle, on our part, to his becoming an American citizen, and his *bona fides* will be assumed when he shall have passed five years in that country, and, renouncing his North German nationality, shall have become an American citizen."

Mr. Bancroft continues: "In the beginning of the debate ex-Consul Meier had most clearly explained that the American law required from the person who becomes naturalized a total renunciation of his allegiance to any other power. Holding fast to this fact, Count Bismarck replied that the German-American citizen, on resuming his relations as a citizen of North Germany, would under the treaty, stand in the light of a foreigner emigrating into North Germany; that he could not be held to the discharge of any *old* military duty, but only to such *new* military duty as would attach to every foreigner emigrating into North Germany and becoming naturalized there."

See also Munde, Ch., The Bancroft Naturalization Treaties. Würzburg, 1868.

"naturalization" to describe this act of political adoption, the view that marriage was considered naturalization is not to be found in any of the correspondence. The treaties were considered by the Senate in executive session, so that the *Congressional Globe* shows no debates upon them. While the President reported the diplomatic correspondence to both Houses, even committee reports seem not to have been made.

The conclusion of the treaties was regarded as a triumph for the United States—recognized at the time as a friendly and liberal concession by the German Government—for it was primarily to citizens of foreign countries emigrating to the United States, and not to American citizens emigrating to foreign countries, that the treaties were deemed to have their practical application. This the European countries seemed to recognize. In the North German Reichstag the Bancroft treaties were debated, and there also no suggestion can be found that marriage was considered a form of naturalization, which is spoken of as a formal proceeding and to require German sacrifice of military service from those otherwise obligated thereto. For this reason, among others, the treaties were in some quarters criticized in Germany.<sup>8</sup>

The important feature of the treaties was the effect to be given in the country of origin when the naturalized citizen *returned*. The fact that his naturalized citizenship was then to be deemed his sole citizenship was a definite victory for the American principle of voluntary expatriation. Little attention was given to the question whether his native citizenship could be deemed to continue while he was *abroad* in possession of his new nationality. This was not the consideration in the minds of the treaty makers, but it is interesting to note that the German Reichstag committee deemed this question not to have been decided by the treaty but to have been left to the municipal statutes of the respective countries.<sup>9</sup> This is not without importance, for even were the view sustained that marriage may popularly be considered a form of naturalization, and that by foreign law the husband's nationality is automatically conferred on his American-born wife, the treaty would still have left in force the American statute which before 1907 did not denationalize an American woman who married a foreigner and resided in her husband's country.

In the light of their origin and of the purposes which these treaties were intended to serve, it seems a strained construction to conclude that marriage was

<sup>8</sup> Cf. v. Martitz, "Das Recht der Staatsangehörigkeit im internationalen Verkehr," Hirth's *Annalen des deutschen Reiches*, 1875, pp. 704 *et seq.*, 1113 *et seq.*; Kapp, "Der deutsch-amerikanische Vertrag," *Preuss. Jahrbüchern*, 1875, v. 35, pp. 508, 534, 660-683, and v. 36, 189 *et seq.* For the effect of the treaties on the German law of citizenship, see Dzialoszynski, S., *Die Bancroft-Verträge*. Breslau, 1913, p. 119.

<sup>9</sup> "To Article I, para. 2: The question whether by or after the acquisition of citizenship in the territory of one contracting party the original citizenship of the emigrant in his own country still continues, is not determined by the treaty and is to be decided according to the internal legislation of the respective party." *Stenog. Berichte des Reichstages des Nordd. Bundes*, 1868, II, 17.

considered by any of the parties as the kind of naturalization they had in view. American naturalization was and is a very formal proceeding involving not only five years' residence, as a rule, but formal renunciation of native citizenship, a declaration of intention, an oath of allegiance and a judicial decision. Even in foreign countries naturalization is usually a ceremony, achievable only on compliance with conditions of various kinds. It cannot be assumed that in the case of women, at a time before women had become "nationality conscious," it was supposed that marriage without renunciation of nationality, without oath of allegiance and without any of the other conditions of formal naturalization, was to operate as naturalization so as to secure or require recognition of the change of nationality by the country of origin. Even the fact that exemption from military service has been extended by Germany to the minor children of naturalized American citizens and to native-born American citizens, sons of German fathers, does not demonstrate that marriage was deemed a treaty form of naturalization.<sup>10</sup>

Possibly some force may be lent to this view by the fact that in 1873 President Grant requested his Cabinet to state its views on expatriation in the light of the Act of July 27, 1868. He wanted advice as to how the Act was to be construed, what acts of the citizen were to be deemed expatriation, what was to be the effect of a formal renunciation of American citizenship, and of prolonged residence abroad, what was to be deemed absence of intent to return, what was to be the effect of return by a naturalized citizen to his native country when not regulated by treaty, whether children born abroad of a person who later became expatriated were to be deemed citizens of the United States, whether an expatriated person can again become a citizen without formal naturalization.<sup>11</sup> The effect of marriage of an American woman to a foreigner is not even mentioned. It is noteworthy that the President's question 2 reads: "May a formal renunciation of United States citizenship, and a voluntary submission to the sovereignty of another power, be regarded otherwise than an act of expatriation?"

The only member of the Cabinet who in his reply considered the status of married women was Secretary Fish. After referring to his understanding of expatriation and to Marshall's view that removal from the country plus a foreign oath of allegiance, places a person out of the protection of the United States—Marshall's was still the day of "indelible allegiance" and Fish's a time when citizenship and protection were much confused—Secretary Fish says:

Expatriation, I understand to mean, the quitting of one's country with an abandonment of allegiance, and with the view of becoming permanently

<sup>10</sup> It seems to have been uniformly held that the naturalization of a parent was also a formal naturalization of his minor child, whose naturalization the treaty required to be recognized by the country of origin. *U. S. v. Reid*, 73 Fed. (2d) 153 (1934). *In re Citizenship of Ingrid Theresa Tobiassen*, 36 Op. Atty. Gen. 535 (1932).

<sup>11</sup> The whole correspondence is printed in *For. Rel.* 1873, II, Appendix, pp. 1185-1232.

a resident and citizen of some other country, resulting in the loss of the party's pre-existing character of citizenship. The quitting of the country must be real, that is to say, actual emigration for a lawful purpose, and should be accompanied by some open avowal or other attendant acts showing good faith, and a determination and intention to transfer one's allegiance.

If, then, to this act of voluntary submission of himself to the sovereignty of another power be added a *formal renunciation of American citizenship*, I cannot see that it can be regarded otherwise than as an act of expatriation.

Hence, it would seem that the *marriage of a female citizen of the United States with a foreigner, subject of a country by whose laws marriage confers citizenship upon the wife of its subjects, and her removal to and residence in the country of her husband's citizenship, would divest her of her native character of an American citizen.*<sup>12</sup> (Italics supplied.)

Reading these quotations together it would seem that Mr. Fish believed formal renunciation of citizenship to be a necessary condition of expatriation. Reading the last paragraph alone, it might indicate that he regarded mere marriage when the husband's law confers citizenship, plus removal from the country, as "divesting her of her native character of an American citizen," not under any treaty, but by American statute. In the same letter, Secretary Fish speaks of such marriage as placing her "out of the protection of the United States while within the territory of the sovereign to whom [she] has sworn allegiance." Evidently Mr. Fish meant protection as an American citizen. For the view expressed would appear to contradict what Mr. Fish said in 1871 and 1875 to the effect that an American-born woman who married an alien did not lose her citizenship, because the Act of 1855 had referred only to foreign women marrying American citizens and not the converse. Certainly in most cases of that kind, women had little interest in citizenship, and formal renunciation of citizenship on the part of American women must have been rare.

Judge Billings, in his much-cited opinion in *Comitis v. Parkerson*,<sup>13</sup> in 1893, expressed the view, believed to be sound, that neither the Act of 1868 nor the

<sup>12</sup> For. Rel. 1873, Appendix, pp. 1187-8. The Attorney General, George H. Williams, responded to the President's question 2 as follows:

"But if such citizen emigrated to a foreign country, and there, *in the mode provided by its laws, or in any other solemn or public manner, renounces his United States citizenship*, and makes a *voluntary submission to its authorities* with a *bona fide* intent of becoming a citizen or subject, I think that the Government of the United States should not regard this procedure otherwise than as an act of expatriation." For. Rel. 1873, App., 1216-7.

"My opinion, however, is that, *in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military service, &c., may be treated by this Government as expatriation, without actual naturalization.* Naturalization is, without doubt, the highest but not the only evidence of expatriation." *Id.* 1217. (Italics supplied.)

<sup>13</sup> 56 Fed. 556, 559 (1893).

naturalization treaties made marriage to an alien a form of expatriation or constituted naturalization under the treaties. He said:

As to whether allegiance can be acquired or lost by any other means than statutory naturalization is left by Congress in precisely the same situation as it was before the passage of this act. During the year 1868, and since, five treaties have been entered into between the United States and foreign governments based upon this statute, in which the right of expatriation is dealt with (which will be referred to hereafter); and in all these treaties the right is confined, as is the statute, to that of citizens or subjects of our country who have become citizens or subjects of others by direct statutory naturalization. So that with reference to the question before the court the law is left where it was previous to the year 1868, and Congress has made no law authorizing any implied renunciation of citizenship.

It seems justifiable, therefore, to conclude that marriage was not deemed under the Bancroft treaties a formal renunciation of citizenship, and that the attempt to apply the word naturalization literally to include marriage is to stretch the word beyond its usual meaning as a formal act of adoption and to permit the letter to violate the spirit. Again we have an illustration of the maxims that "the letter killeth but the spirit giveth life,"<sup>14</sup> and that *qui haeret in litera haeret in cortice*.<sup>15</sup>

#### THE HISTORICAL DEVELOPMENT

Prior to the Act of February 10, 1855,<sup>15a</sup> there appears to have been no statutory definition of the citizenship of married women. By the Act of that date, it was provided that an alien woman who married a citizen of the United States thereby became an American citizen. But Congress avoided the suggestion that the converse of this proposition was law, namely, that an American woman who married an alien thereby became an alien. On many occasions, courts and Secretaries of State have pointed out, as will presently appear, that an American woman who married an alien did not lose her American citizenship. The few scattered suggestions to the contrary seem of insufficient weight to balance the overwhelming authority that American women marrying aliens did not lose American citizenship; and the locality of the matrimonial domicile is believed to be immaterial to the question.

Whatever doubt may have prevailed on the subject before 1907 (when Congress actually did provide for the first time that a married woman, even American-born, takes the nationality of her husband),<sup>16</sup> and between 1907

<sup>14</sup> Corinthians II, ch. 3, verse 6.

<sup>15</sup> "He who considers merely the letter of an instrument goes but skin-deep into its meaning." Broom's Legal Maxims, 8th ed. 1911, p. 533, citing Coke's Littleton, 283 b.

<sup>15a</sup> Rev. Stat. 1994. Repealed by Sec. 6 of Act of Sept. 22, 1922, providing that marriage shall not confer nationality, even on foreign women marrying Americans.

<sup>16</sup> 34 Stat. 1228. This Act was prospective only, not retrospective. H. Rep. 6431, 59th Cong. 2nd Sess., Jan. 18, 1907. See *In re Lynch*, 31 Fed. (2d) 762 (S. D. Cal. 1929):

and 1922, should be deemed dissipated by the Act of September 22, 1922, asserting that marriage is without effect on the citizenship of women, and by the Acts of July 3, 1930,<sup>17</sup> and March 3, 1931,<sup>18</sup> which provide that any American-born woman who may be deemed to have lost her citizenship by marriage to an alien, may be repatriated as an American citizen by mere petition to a court of record in the United States, or may be readmitted outside the quota.

Yet the statutory record is not free from ambiguity. The Act of 1907 was by some thought to confirm occasional previous administrative and judicial rulings expatriating American women who had married aliens. But the provisions for the easy resumption of American citizenship by American women who had married aliens may be some indication that Congress seemed to believe the expatriation by marriage qualified only. Possibly they thought, with Secretary Blaine, that American citizenship was "in abeyance during coverture." At all events, the Act of 1907, and especially the case of *MacKenzie v. Hare*,<sup>19</sup> which indulged the fiction that by marrying an alien the lady consents to a result "tantamount to expatriation," caused the feminist revolution, whose echoes still reverberate at home and abroad. The Cable Act of 1922,<sup>20</sup> the married women's declaration of independence in citizenship, was the result. But the impressions left by the Act of 1907 were still influential, so that by Section 3 of the 1922 Act an exception was made for American women who resided *abroad* with their husbands, against whom the presumptions of expatriation attaching to the naturalized citizen who resides abroad were to be applied, *i.e.*, if residing continuously for two years in her husband's native country or five years in any other, expatriation was to be presumed. But as a presumption is manifestly not actual expatriation, and as these provisions of the Act of 1907 were construed not to expatriate but to afford the Department of State a guide for purposes of diplomatic protection only,<sup>21</sup> such an American woman has not by marriage or even residence abroad lost her American citizenship, although acquiring her husband's nationality, even in a country with which the United States has a naturalization treaty.<sup>22</sup>

In the Attorney General's opinion in the case of Mrs. Thorgaard, *supra*,

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"Prior to the Act of March 2, 1907, there was no declaration of Congress as to whether a woman marrying an alien lost her American citizenship. . . . The marriage of Mrs. Lynch, having occurred prior to March 2, 1907, is not, of course, affected by the provisions of the statute" of 1907. <sup>17</sup> 46 Stat. 854. <sup>18</sup> *Ibid.* 1511.

<sup>19</sup> 239 U. S. 299, 312; 36 Sup. Ct. 106 (1915); this JOURNAL, Vol. 10 (1916), p. 165.

<sup>20</sup> 42 Stat. 1021. H. Rep. 1110, 67th Cong. 2d Sess.

<sup>21</sup> See Atty. Gen. Wickersham's opinion in Gossin's case, 28 Op. Atty. Gen. 504 (1910). This opinion, which held that mere return to the United States overcame the presumption, has wisely been followed by the Department of State, notwithstanding conflicting opinions of the Federal courts. For a good résumé of the judicial interpretation of the Act of 1907, see Gettys, *Law of Citizenship*, Chicago, 1934, pp. 167-172.

<sup>22</sup> Thorgaard's case, *supra*, note 4.

note 4, appears part of a letter from the Secretary of State, May 10, 1933, reading: ". . . it would seem to follow that no American woman should lose her American citizenship by the mere fact of the naturalization of her husband as the citizen of a foreign country *unless she herself took some affirmative step* to acquire the nationality of a foreign country." Inasmuch as the Act of 1922, Section 3, provides that "a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court," and inasmuch as the word "marriage" is construed by the Department of State to refer not only to the time of celebration but to the state of marriage, it is not apparent why pre-1907 marriages should not since 1922 have been construed to have the same legal effect on the woman's status as post-1922 marriages, or why the contrary constructions announced before 1922 were not thereby overruled. Naturalization abroad and original foreign nationality of the husband can hardly be deemed a material distinction.

But it is disquieting to note that the Act of 1922 for the first time in American statutory history makes a distinction between the married woman residing at home and the one residing abroad. Administrative rulings, however mistaken, began to carry weight with Congress. While this provision of the Act of 1922 was entirely repealed by the Act of July 3, 1930, which facilitated the repatriation of American women who had lost their citizenship by marriage before 1922, presumably under the Act of 1907,<sup>23</sup> the Acts of 1930 and 1931 do include among the women to be admitted outside the quota or promptly naturalized those who had lost their citizenship "by marriage to an alien and residence in a foreign country" or "by residence abroad after marriage to an alien." The committee reports<sup>24</sup> clearly indicate that this was a

<sup>23</sup> In the meantime, committees of Congress had passed upon the case of Mrs. Ruth Bryan Owen, whose seat had been contested on the ground that, by her marriage to a British subject, she had lost her American citizenship and had not been for seven years preceding her election a citizen of the United States. She had married in 1910, during the operation of the Act of March 2, 1907. While the majority of the committee held that the seven-year requirement preceding the election need not be continuous, the minority held that Mrs. Owen had the status of a woman who never lost her citizenship. Had she married prior to the Act of 1907, it is not to be doubted that the majority of the committee would have shared this view. (See House Report 968, 71st Cong., 2nd Sess., William C. Lawson—Ruth Bryan Owen Election Case, March 24, 1930.)

<sup>24</sup> Sen. Rep. 1723, 71st Cong. 3rd Sess., explaining Section 4 of Act of March 3, 1931, reads:

"The purpose of section 4 is to eliminate the remaining discrimination against married women in the statute relating to citizenship and naturalization, summarized as follows:

"(1) The section permits a women [*sic*] who since September 22, 1922, has suffered an actual or presumptive loss of her United States citizenship because of foreign residence after marriage to an alien to resume her citizenship in the same manner now prescribed for the resumption of United States citizenship by American women who married aliens prior to September 22, 1922. It will be remembered that an act approved July 3, 1930, repealed the presumption of loss of United States citizenship by a women [*sic*] on account of foreign

reference to those women who, under the Act of 1922, had failed to overcome the presumption, therein established, of expatriation by continued residence abroad, a presumption repealed in 1930. It can not be deemed to refer to the case of marriages occurring before 1907 or to constitute a Congressional declaration of *ex post facto* expatriation which prior to 1907 Congress had declined to make. If it were to be considered as such, it would be inconsistent with the spirit of the Acts of 1922 and 1930, which was to emancipate and not coördinate women in matters of citizenship. It would, if so construed, have maintained the policy of merger and female denationalization which the Act of 1907 had inaugurated, and have applied it not only to post-1922 marriages—for which even as a presumption it has since been repealed—but to pre-1907 marriages, not since referred to in legislation. That would be an extraordinary result. It seems preferable to conclude that just as the Act of 1907 was not deemed retroactive, so the Acts of 1922 and 1930 may not be deemed more retroactive than the committee reports specifically suggest, thus avoiding the inference of denationalization by indirection of American non-resident women who had married aliens before 1907. Yet in the Act of 1930 and in the Act of 1931 a distinction is made between an implied loss of American citizenship by mere marriage and an "affirmative act" of expatriation, the facilities for readmission applying to the former only. The Act of 1930 expressly permits the readmitted woman to reside abroad permanently without any effect on her American citizenship. Whether there were any expatriated women under the Act of 1922 the writer is not informed; but it has been soundly held that the presumption of expatriation of the Act of 1922 enabled the Department of State merely to decline protection and not to decree expatriation.

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residence after marriage to an alien; but since the repeal is not retroactive this bill indicates a way whereby the American woman whose citizenship rights were affected by the presumption may reestablish her citizenship. At the present time there are native-born American women who have presumptively lost their United States citizenship by foreign residence after marriage to foreigners and who have not been able to overcome to the satisfaction of the State Department the now obsolete presumption. Apparently they are not permitted United States passports and are not afforded protection abroad. Yet, since their loss of United States citizenship is merely presumptive, it is doubtful whether any court proceeding for naturalization is now available to them." [p. 2.]

Sen. Rep. 614, 71st Cong. 2nd Sess., p. 4, indicates that H. R. 10960 facilitating naturalization for American women who had lost their citizenship by marriage referred only to those who had lost it after March 2, 1907 "by the provisions of the 1907 Act." The repeal of the presumption of expatriation referred only to those women affected by "the 1922 Act" (p. 5). On the amendment to sec. 4 (f) of the Immigration Act, enabling American women who had lost citizenship by marrying aliens and residing abroad to come in outside the quota, the committee again indicates as follows that only loss of citizenship under the Act of 1922 is contemplated (p. 5):

"H. R. 10960 amends the above provision of law so that such native-born women or one who has lost her American citizenship by marriage and foreign residence since September 22, 1922, may reënter the United States outside the quota, notwithstanding the fact that the marriage relationship still exists."

This statutory development would seem to indicate that prior to 1907 there was no suggestion that marriage of an American woman to an alien expatriated, regardless of the matrimonial domicile; that from 1907 to 1922, marriage did expatriate; that after 1922, marriage ceased to expatriate, except that from 1922 to 1930, residence abroad for certain periods created a presumption of expatriation; and that since 1930, even this exception has been repealed. If the law before 1907 was any different from the law since 1930, it must rest on a source other than statute or, it is submitted, treaty. It is proper, therefore, to examine the judicial record to see what light it throws on our problem.

#### JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS

It has been conceded by many courts, by the Attorney General, by the Department of State and by the Naturalization Service, that a native-born woman who married a foreigner before 1907 and continued to reside in the United States did not lose her American citizenship by the marriage.<sup>25</sup>

Without any authority from statute, however, there have been expressions of opinion—erroneous, it is believed—to the effect that, when the American woman left the United States to reside abroad with her husband, expatriation of some kind was thereby affected. It is believed that there is no basis in law for any such alleged distinction, and that marriage had no effect whatever on the citizenship of an American-born woman marrying a foreigner until the Act of 1907, the policy and terms of which in this respect have since been repudiated by the Congress of the United States.<sup>26</sup> On the other hand,

<sup>25</sup> *In re Lynch*, 31 F. (2d) 762 (S. D. Cal. 1928); *In re Fitzroy*, 4 F. (2d) 541 (1925). *In re Krausmann*, 28 F. (2d) 1004 (1928). In this case an American-born woman who had married an alien before 1907 petitioned for naturalization. The Naturalization Service contended that she was a citizen, not requiring naturalization, and that the Act of 1907 made a change in the common law, and was not merely declaratory. The court held otherwise, but, it is submitted, wrongly.

*Comitis v. Parkerson*, 56 Fed. 556 (1893); *Mrs. D'Ambrogia's Case*, 15 Op. Atty. Gen. 599; Sec. of State Fish to Mr. Washburn, Feb. 24, 1871, Van Dyne, Citizenship, 133, Moore's Dig. III, 449; Sec. of State Blaine to Mr. Phelps, Feb. 1, 1890, For. Rel. 1890, 302, Moore's Dig. III, 454; Opinion of Mass. Atty. Gen. Allen, Oct. 13, 1920, Status of American women married to aliens prior to March 2, 1907, Mass. Atty. Gen.'s Rep., 1920, p. 260.

<sup>26</sup> The following cases, holding that a *pre*-1907 marriage of an American woman to a resident alien made the woman an alien were, it is submitted, wrongly decided: *In re Page* 12 Fed. (2d) 135 (1926); *In re Krausmann*, 28 Fed. (2d) 1004 (1928); *In re Wohlgenuth*, 35 Fed. (2d) 1007 (1929). These were all petitions for naturalization by the wife, brought under the Act of 1922. The Naturalization Service correctly, it is believed, maintained that they were ineligible for naturalization, having been native-born and married before 1907. The court assumed that the Act of 1907 was declaratory of the common law—an erroneous assumption, as will presently be shown. But the issue before the court was probably not deemed of vital importance, for the question was whether the woman was already a citizen, requiring no naturalization, or whether she was *now* to be admitted to citizenship. Her present title to citizenship was not denied by any one. But if there was so much confusion on the woman's nationality when the matrimonial domicile remained domestic, it is com-

it is submitted that the views of the Attorney General and the courts which have ruled that marriage of an American woman to a foreigner before 1907 had no effect on the nationality of the woman and left her American citizenship unaffected are sound and are alone sustainable as expressing the American law on the subject.

Citizenship in the United States rests on the common law as modified by statute. Only Congress<sup>27</sup> can denationalize an American native-born citizen, and never before 1907 did Congress provide that the marriage of an American woman to a foreigner expatriated her, regardless of the matrimonial domicile. On the contrary, Congress took pains to indicate that it had no such intention. Mr. Van Dyne said in 1905<sup>28</sup>: "Does an American woman become an alien by marriage to a foreigner? There is no statutory declaration to that effect."

By the Act of February 10, 1855, as already observed, it was for the first time provided that an alien woman who married a citizen of the United States thereby became an American citizen. The omission of the converse proposition is striking, for Congress must have considered the two positions together—the alien woman marrying an American and the American woman marrying an alien. We are, therefore, justified in believing that no change from the common law rule as to the nationality of the native woman marrying a foreigner was intended to be effected. Said Secretary of State Fish in 1871:

By the law of England and the United States, an alien woman on her marriage with a subject or citizen merges her nationality in that of her husband. *But the converse has never been established as the law of the United States*, and only by the Act of Parliament of May 12, 1870 (33 & 34 Vict. 104, c. 14) did it become British law that an English woman lost her quality of a British subject by marrying an alien.<sup>29</sup>

Only in 1907, by the Act of March 2, did Congress for the first time suggest, in a statute which survived only fifteen years, that a married woman acquired the nationality of her husband, and hence that the marriage of an American woman to an alien expatriated her. That was not the law before 1907. Judge Billings, in his able opinion in the case of *Comitis v. Parkerson*,<sup>30</sup> pointed out that Congress, and not the courts or the Executive, lays down

prehensible that confusion might be even greater when the matrimonial domicile was foreign. The view of two courts in 1925 and 1929 that the *foreign* domicile denationalized, but not the domestic, was purely *dictum*, for the pre-1907 married women then seeking naturalization had never left the United States. *In re Fitzroy*, 4 Fed. (2d) 541 (1925). *In re Lynch*, 31 Fed. (2d) 762 (1929). Both were correctly held to have always remained citizens, notwithstanding marriage to an alien.

<sup>27</sup> Treaties are left out of account here, such as treaties ceding away territory and the nationality of its inhabitants, and formal naturalization treaties. An attempt has been made, *supra*, to indicate that a proper interpretation of the Bancroft naturalization treaties does not include marriage as a treaty form of naturalization.

<sup>28</sup> *Citizenship of the United States*, p. 127.

<sup>29</sup> Van Dyne, *op. cit.*, 133; Moore's Digest, III, 450-451. (Italics supplied.)

<sup>30</sup> 56 Fed. 556, 563.

the law of citizenship in the United States and determines who are and who are not in law citizens. Judge Billings said:

My conclusion, for the reasons which I have thus stated, is that on the questions of naturalization and expatriation the judgment of the courts must not outrun the action of Congress, and that the courts must carefully observe the lines of demarcation which the Congress has drawn; that any imperfections or inconsistencies in those lines must be supplied and corrected by Congress, and not by the courts; and that the laws of Congress do not authorize, nor do her own acts impute, any cessation of her citizenship of the United States.

#### (A) THE COMMON LAW

It is well to go back to the common law on this subject. Holdsworth, in his *History of English Law*,<sup>31</sup> says, in dealing with the common law rule:

Contrary to the rules of continental law, marriage had no effect on the nationality of the woman. An English woman marrying an alien still remained a British subject: an alien woman marrying a British subject remained none the less an alien. The latter branch of the rule was changed in 1843; but the doctrine of the indelibility of allegiance had prevented any change in the former branch. The change was recommended by the Naturalization Commissioners in 1869.

Piggott, in his work on *Nationality*,<sup>32</sup> says: "By the common law marriage had no effect on the nationality of a woman, either to make a foreign woman English or an English woman foreign."

Notwithstanding the change effected in the first part of this common law rule by the Aliens Act of 1844 (7 & 8 Vict., c. 66, s. 16), and in the second part by the Act of 1870 (33 & 34 Vict., c. 14, s. 10 [1]), the common law doctrine was revived by Vice-Chancellor Hall in *Bacon v. Turner*, 34 L. T. 647, in which he held that an English woman married to a German and residing abroad with him "could not be considered as a foreigner," which, of course, was the law before the British Act of 1870, as it was the law of the United States for an American woman, it is submitted, before the Act of 1907.

Sir Alexander Cockburn, Lord Chief Justice of England, in his celebrated Report on Nationality (1869), which led to the statute of 1870, says, in speaking of the common law in England: <sup>33</sup>

To this should be added, to complete this sketch on the law of England on this subject, that, contrary to the law of all other nations, except those which have followed the English law, marriage, by the common law, had no effect on the nationality of women. An English woman marrying an alien still remained a British subject; an alien woman marrying a British subject remained none the less an alien. (Coke's Littleton 31b.)

The children of a British mother and an alien father could inherit,<sup>34</sup> and

<sup>31</sup> Vol. IX, p. 91.

<sup>32</sup> London, 1907, p. 57.

<sup>33</sup> P. 11.

<sup>34</sup> Bacon's Abridg. 4th ed., 1778, Aliens A; Cunningham's Law Dictionary (1759) s. V. Aliens, citing 1 Vent. 422.

the lessee of an English woman married to an alien could maintain ejectment.<sup>35</sup>

When, therefore, several of the lower courts in this country undertook to say by way of dictum that the Act of March 2, 1907, was a statutory enactment of what had previously been the common law rule, they were mistaken, for the common law rule had in fact left citizenship unaffected by marriage.<sup>36</sup> And even District Judge Morton is wrong in his attempted qualification of the rule when he says, as dictum: "The decided weight of judicial authority is that the woman did not at common law lose her citizenship by marrying an alien unless she removed from the country."<sup>37</sup> There was no such qualification to the common law rule.

*Shanks v. Dupont*<sup>38</sup> was one of the earliest cases to deal with the subject in the United States. That case involved a contest for an estate between the heirs of two sisters, Ann and Mary Scott, both natives of South Carolina before the American Revolution, one of whom (Ann) had married an English officer, Shanks, and removed with him to England in 1782, and the other of whom had remained in the United States. The question was (a) whether the sister who had married an Englishman had thereby lost her American citizenship; and (b) whether, by the removal to England and her adherence to the enemies of the United States, she had elected British nationality within the terms of the Treaty of 1783 and hence acquired the protection of the Treaty of 1794 in respect of real property rights in the State of South Carolina. Justice Story, for the majority of the court, held that the marriage of Ann with Shanks, an English subject, in no way affected her American citizenship, but that, having actually been born a British subject, she had, by removal to Great Britain and adherence to the British Crown, elected British nationality within the terms of the Treaty of 1783. The same result would have followed, had Ann Scott been a man or an unmarried woman, for the marriage was an immaterial fact. On the first point, the effect of marriage, Justice Story said:<sup>39</sup>

Neither did the marriage with Shanks produce that effect; because *marriage with an alien*, whether a friend or an enemy, *produces no dissolution of the native allegiance of the wife*. It may change her civil rights, but it does not affect her political rights or privileges. (Italics supplied.)

On the second point, Justice Story expressly held that Ann Shanks' right of election of British nationality under the treaty was independent of any wish of her husband. He said:<sup>40</sup>

<sup>35</sup> *Miller v. Rogers*, 1 Car. & K. 390 (1844).

<sup>36</sup> See *In re Page*, *In re Krausmann*, *In re Wohlgenuth*, *supra*, note 26. See also *Petition of Drysdale*, 20 Fed. (2d) 957 (1927).

<sup>37</sup> *In re Fitzroy*, 4 Fed. (2d) 541 (1925); see similar dictum in *In re Lynch*, 31 Fed. (2d) 762 (1929). <sup>38</sup> 3 Peters 242, 246 (U. S. 1830). <sup>39</sup> P. 246. <sup>40</sup> P. 248.

The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character.

The dissenting judge, Johnson, agreeing with the Supreme Court of South Carolina, went even further and held that not only was the South Carolina citizenship of Mrs. Shanks not affected by her marriage, but that her removal to England with her husband could not be considered as an election, within the terms of the Treaty of 1735, to renounce her South Carolina citizenship.

Just when the view originated that it made a difference in the American citizenship of the American-born wife whether she remained in the United States or went abroad with her husband, it is hard to say. That there was no statutory authority for any such distinction is beyond doubt. It must have rested on the assumption that *Shanks v. Dupont* justified the distinction, whereas it is apparent that that case makes it clear that the removal to England was regarded by the majority of the court as an election of British citizenship under the Treaty of 1733, which contemplated a division of the population of the American Colonies, all theretofore British subjects, into those who elected to become American citizens and those who elected to remain British subjects. Mrs. Shanks was deemed to come within the latter class and to have adhered to Great Britain, but her marriage to an English subject was entirely immaterial. As already observed, had she been a maiden lady or a man, the result would have been the same. The case was decided under the terms of a special treaty, a fact which existed in no later case. To construe *Shanks v. Dupont*, therefore, as authority for the view that, by removal of an American married woman to the country of her alien husband, she renounces her American citizenship, seems unsustainable. There was no other authority on the question, for it has already been observed that the Act of 1855, a grant, not a denial, of citizenship, applied only to alien women marrying American citizens, and not the converse. The cases<sup>41</sup> which hold that an American woman does not lose her citizenship by marriage (before 1907) to an alien, when, as it happened, she continued to reside in the United States, are not to be construed as a ruling that when she does *not continue* to reside in the United States her American citizenship is thereby lost. And it is further submitted that the Act of 1868, conceding the general right of the individual to expatriate himself, did not change the law as to married women and imply that an American woman who married an alien and possibly by his law acquired his citizenship, thereby lost her American citizenship. Dicta to this effect are without solid foundation.<sup>42</sup>

<sup>41</sup> See cases cited *supra*, note 25.

<sup>42</sup> *In re Lynch*, 31 F. (2d) 762 (S. D. Cal. 1929); *In re Fitzroy*, 4 F. (2d) 541 (D. Mass. 1925); *Pequignot v. Detroit*, 16 Fed. 211 (1883).

## (B) EFFECT OF STATUTE AND TREATY

There is only one circumstance, against many to the contrary, which even inferentially sustains the view that Congress ever considered, prior to 1907, that an American woman marrying a foreigner lost her American citizenship. That occurred in the case of Nellie Grant Sartoris, a daughter of General Grant, who becoming a widow by the death of her British husband was by Joint Resolution of May 18, 1898,<sup>43</sup> "on her own application, unconditionally readmitted to the character and privileges of a citizen of the United States." That isolated act can be explained by the desire to remove all doubt from a situation that had been beclouded by a confusing variety of administrative expressions and judicial dicta which overlooked the distinctions between citizenship and protection and the right to a passport, between citizenship of alien women marrying Americans and of American women marrying foreigners; and also by the fact that Article III of the Treaty with Great Britain of 1870 provided for renunciation of acquired naturalization, an act which thereafter refuted any possibility of claim to citizenship by the naturalizing country. Mrs. Sartoris had by the British statute (not by the treaty, it is believed) become a British subject (though it is submitted that by American law she had not ceased to be American), and desiring to renounce that British statutory nationality, she invoked the treaty in order to do so. However she may thereby have affected her British nationality, she did not in law add to her rights as a native-born American citizen. The Congressional committee which reported out the resolution gave no explanation of its reasons.

In the light of modern developments, which clarify the earlier doubts, the resolution was unnecessary to confer the rights of American citizenship on Mrs. Sartoris. The suggestion in the resolution that she had lost her citizenship by the naturalization treaty of 1870 is in conflict with the contemporaneous views of the Department of State, as indicated by the declaration of Secretary of State Fish in 1871 (*supra*), and with the views of Congress implied in the Acts of 1907, 1922, 1930 and 1931, which legislated on citizenship of married women in disregard of any supposition that naturalization treaties affected the subject, and particularly that they serve to expatriate an American-born woman who had married a foreigner. Had naturalization treaties taken American citizenship from American women who married foreigners, there would have been but little reason for the Act of 1907, so far as concerns countries with which the United States had naturalization treaties, and the Acts of 1922 and 1930 might well then have given rise to the suggestion that they violated treaties of the United States. No such suggestion appears ever to have been made. The case of Mackenzie v. Hare,<sup>44</sup> in which an American-born woman who had married a British subject was held to have lost her American citizenship, rested solely on the subse-

<sup>43</sup> 30 Stat. L. 1496.

<sup>44</sup> *Supra*, note 19.

quently repealed Act of 1907; had the naturalization treaty with Great Britain been involved, the court would doubtless have mentioned that fact. That marriage to an alien is not a form of expatriation under the Act of 1868 or under naturalization treaties is indicated by the celebrated opinion of Judge Billings in *Comitis v. Parkerson*, already quoted.<sup>45</sup>

There is no evidence that, in concluding the Bancroft and other naturalization treaties, or in enacting the Expatriation Act of 1868 or the Naturalization Act of 1906, anybody assumed that a change in the law of married women was being effected or that new legal effects were being given to marriage, notwithstanding the fact that, under American statutes from 1855 to 1922, American citizenship had been conferred on alien women marrying American citizens, and that, as a matter of domestic convenience, it has been popularly suggested that such incorporation of foreign married women into American citizenship was a form of naturalization. The naturalization treaties, as Judge Billings showed, were intended to apply to formal voluntary acts performed after full deliberation and involving a renunciation of prior allegiance and the performance of other conditions, which was not expected of married women, who might unknown to themselves be changing their nationality by their husband's law. It is submitted that the nationality of married women depends on statute and not on a naturalization treaty.

#### (c) MODERN RULINGS

*Attorney General's Opinions.* In 1862 Attorney General Bates ruled in *Mrs. Preto's case* <sup>46</sup> that the marriage of an American woman to a Spaniard and their removal to Spain was "no evidence of an attempt on their part to exercise the right to cast off her native (American) allegiance and adopt a new sovereign." Mr. Bates added:

That was a legitimate and honorable marriage, fully recognized by our own law, and binding upon the parties and their children. But did it have the effect to deprive the young wife of her native citizenship, and transform her at once into an alien, beyond the reach of her country's protection, and cut her off from inheritance in her father's house? No, certainly not; no more than it transformed the "Spanish refugee, Francis Preto" into an American citizen. We have no law forbidding intermarriage between citizens and aliens. Such marriages are as legal and legitimate as any other marriages, but they do not change the political status of the parties to them. . . . His domicile . . . is the domicile of his wife and children; and that, too without any reference to the different, possibly conflicting, political relations of the parties. The wife, in this case, performed a simple duty in going willingly to her husband's domicile in a foreign country, and remaining with him there, as long as he had a domicile on earth. . . .

I waive all discussion here upon the question of the right of voluntary expatriation and the choice of new allegiance. The question does not

<sup>45</sup> *Supra*, pp. 401, 402, 408.

<sup>46</sup> 10 Op. Atty. Gen. 321.

arise in this case, because, supposing the legal existence of the right (and I do suppose it), the removal of Mrs. Preto and her daughter to Spain and their residence in that country under the circumstances, is, in my judgment, no evidence of an attempt on their part to exercise the right to cast off her native allegiance, and adopt a new sovereign.

In 1877, Solicitor General Phillips, for Attorney General Taft, in the case of Mrs. D'Ambrogia,<sup>47</sup> held that when once an alien woman who had married an American citizen acquired American citizenship, her subsequent remarriage to an alien, after the death of her first husband, did not denationalize her, but that she remained "permanently" an American citizen, "defeasible only as in the case of other persons," *i.e.*, by formal naturalization abroad. There is no suggestion that marriage to an alien was a form of denationalization or naturalization in the husband's country, either by treaty or otherwise.

On the other hand, an opinion of Attorney General Stanbery in 1866 on the liability to American income tax of a woman, Madame Berthemey, born in France of an American father and married to a Frenchman, is sometimes deemed to be an opinion to the contrary.<sup>48</sup> The facts of that case must be understood, and it must also be borne in mind that Mr. Stanbery denied the possibility of dual nationality, an unsound conclusion. Madame Berthemey had never been in the United States. Mr. Stanbery conceived Section 1993 of the Revised Statutes (Act of 1855), conferring citizenship on children born abroad of American fathers, as naturalizing her in the United States, and regarded her marriage to a citizen of her native country, France, as a sort of denationalization or perhaps election. He thought that if, at the time of the Act in question (1864), the person had acquired "full rights of citizenship in a foreign country," "the primitive or original nationality impressed by the statute of 1855 may be regarded as having determined." There is no authority for such a view, unless the acquisition of citizenship abroad is accomplished by formal naturalization; it was a unique interpretation, which has had no support either from Congress or from the courts, and was made for the sole purpose of determining whether the lady was subject to income tax. Mr. Stanbery concluded that by her marriage to a Frenchman she had acquired citizenship in France, and then concluded that she had by that marriage impliedly lost her American citizenship, obtained by virtue of the Act of 1855. Possibly in that day the opinion may not have seemed as strange as it does now, but that it is not sustainable under the modern interpretation of Section 1993 will hardly be gainsaid. The fact that she never came to the United States and was a native of France doubtless had much influence on Mr. Stanbery's opinion. He thought that under the circumstances French law should take precedence over American law.

In a similar case, passing upon the liability of a non-resident to income tax, Attorney General Hoar in 1869<sup>49</sup> said of Mr. Stanbery's opinion: "He

<sup>47</sup> 15 Op. Atty. Gen. 599.

<sup>48</sup> 12 *Ibid.*, 7.

<sup>49</sup> 13 *Ibid.*, 128.

does not expressly but only inferentially decide that she is not a citizen of the United States." But Mr. Hoar decided, so far as concerns the question of liability to income tax, to follow Mr. Stanbery's opinion, and to hold immune from such liability an American woman who had married a foreigner and resided abroad, even though she had been born in the United States. He added:

I do not propose to discuss the general question of the right of expatriation under our law, or to express any opinion whether a woman who is by birth a citizen of the United States, and by marriage has become a citizen of France, is not after such marriage a citizen of the United States in a qualified sense; but, as the opinion of Mr. Stanbery has interpreted the words "citizen of the United States residing abroad" in the 116th section of the internal-revenue law, to mean exclusive citizenship, and not to include women domiciled abroad, who have become citizens of a foreign country by marriage, and as the laws of the United States have adopted a policy of permitting women to acquire citizenship by marriage, by enacting that any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen, I prefer, for the purpose for which my opinion is requested, to adhere to the conclusions reached by Mr. Stanbery.

The qualified character of Mr. Hoar's holding is evident; he was passing only on liability to income tax and manifests his doubts whether the ruling could extend to other types of cases. His assumption that marriage affects citizenship, which, at best, applied only to alien women marrying Americans, is a view from which the United States has departed, and the suggestion that because marriage of an alien woman to an American confers American citizenship, it implies the converse—that marriage of an American woman to an alien confers foreign citizenship—is negated by the express omission of any such converse from the Act of 1855. These two opinions of the Attorney General, which stand alone, and relate to special circumstances, can hardly be assumed to establish the general proposition that prior to 1907 the marriage of an American-born woman to an alien, whether the matrimonial domicile was in the United States or abroad, deprived the woman of her native American citizenship. Mr. Hoar's inference that in general a native woman marrying an alien remained a citizen "in a qualified sense," would indicate his doubts as to the breadth of his ruling. The qualification in fact is without legal meaning. One is either a citizen of the United States, or one is not. The expression "in a qualified sense" may have come into use through the long prevailing confusion between citizenship, on the one hand, and the right of protection or to a passport, on the other, reference to which will be made hereafter.

Attorney General Cummings has recently ruled that since the Act of 1922, which in this respect was designed to overcome the policy of the Act of 1907,

the marriage of an American woman to an alien must be regarded as not affecting her American citizenship, notwithstanding that by his law she becomes a citizen of her husband's country or, a fact not mentioned, that a naturalization treaty with that country is in force.<sup>50</sup> This should serve to remove any doubts which may have existed as to the status of American women married to aliens before 1907.

*Judicial Opinions.* In the case of *Beck v. McGillis*,<sup>51</sup> there was under consideration a will which made gifts to a daughter who had married a British subject. As to the nationality of this daughter, Harris, J., said:<sup>52</sup>

As to the capacity of McGillis and wife and their children to take under the will. Mrs. McGillis was born a citizen of the United States. While a minor she intermarried with a subject of Great Britain, but neither her marriage nor her residence in a foreign country constitute her an alien. Whether, indeed, a citizen can, by mere act of his own, dissolve his native allegiance and become an alien, is not definitively settled in this country. The question has been regarded as one of much difficulty as well as delicacy, and, though frequently discussed before the Supreme Court of the United States, it has never, I believe, been regarded as the leading point in the case presented, so as to call for the judgment of the court. But it has been decided by that court, that the marriage of a feme sole with an alien husband, does not produce a dissolution of her native allegiance. (*Shanks v. Dupont*, 3 Peters, 242.)

*Doyle v. Town of Diana*,<sup>53</sup> was a taxpayer's action questioning the issue of certain bonds. The case turned on the right of certain persons to vote, for the issue had been approved by only one vote. E. W. had been born in Canada of an American father. She had been brought to New York State as a child and spent most of her life there. She was married in Canada to a Canadian. A few months after the marriage, they came to New York and lived there until after his death in 1892. She continued to reside there until the date of suit. She had remarried in 1919. Kruse, P. J., said:

Her father being a citizen of the United States, she was likewise a citizen thereof, although born in Canada, and the fact that she married a Canadian did not change her citizenship. (10 U. S. Stat. at Large, 604, chap. 71, § 1, approved Feb. 10, 1855; revised by U. S. R. S. § 1993; *Shanks v. Dupont*, 3 Pet. 242; *Beck v. McGillis*, 9 Barb. 35, 49.)<sup>54</sup>

This is sound law, and indicates the error of Attorney General Stanbery's opinion, *supra*.

<sup>50</sup> Opinion of Att. Gen. to Sec. Labor, Aug. 3, 1933 in re citizenship of Mrs. Marion Thorgaard. <sup>51</sup> 9 Barb. 35 (N. Y. 1850). <sup>52</sup> *Ibid.*, pp. 49-50.

<sup>53</sup> 203 App. Div. 239, 196 N. Y. S. 864 (1922).

<sup>54</sup> *Ibid.*, 241-2. U. S. v. Reid, 73 Fed. (2d) 153 (C. C. A. 9th, 1934), 19 Minn. L. R. 589, holds that naturalization of an American-born father in Canada, naturalized his minor American-born daughter, and that her Canadian nationality was obtained by that naturalization and not by her subsequent marriage to a Canadian.

The *Petition of Zogbaum*,<sup>55</sup> involved a naturalization petition. The plaintiff was born in Minnesota in 1871 and was educated there and in South Dakota. In 1896 she was married in Norway to Mr. Zogbaum, with whom she lived until his death in 1921. In 1925 she returned, bearing a Norwegian passport. Judge Elliott, in passing upon her petition, held that the fact that the statute of 1855 was silent on such marriages left the common law rule in force, and found that she was at all times an American citizen, her privileges as such unaffected by the Act of 1907, and at liberty to assert her American citizenship at any time.

In reaching this conclusion Judge Elliott, it is believed, was eminently sound. His conclusion differs from that of some other district judges,<sup>56</sup> but the Naturalization Service, it is understood, shared his view both prior and subsequent to the *Zogbaum* decision, until for some reason the Naturalization Service was persuaded to adopt the contrary view set forth at the beginning of this article. The departure is regrettable.

In the well-known case of *Comitis v. Parkerson*,<sup>57</sup> Judge Billings called attention to the fact that expatriation requires statutory authority and must be predicated upon some "unequivocal act, which act must also be recognized by the government to be adequate for that purpose." Prior to 1907, as already observed, there was no statute which imposed the penalty of expatriation upon the marriage of an American-born woman to an alien, regardless of where they lived or were married, and no such extraneous operative condition as residence should be lightly injected into American law. Any expression of dictum or opinion to that effect can hardly be given much weight.

The following is Judge Billings' statement in 1893:

The arguments on both sides have conceded (what could hardly be denied) that the tie which binds together a government and its subjects or citizens, and which creates the reciprocal obligations of protection and obedience, can be dissolved only in such a mode as has the assent of both parties; that, so far as concerns the government, this assent must be expressly made, or must be inferred from the fundamental or statutory provisions by which the action of the government involved is regulated. A change of the allegiance due to the United States, a throwing of it off on the part of a citizen, involves on the part of the government an acquiescence from that department of government which, according to its constitution, must acquiesce in it; and, on the part of the citizen, the manifestation of the purpose to expatriate himself by some unequivocal act, which act must also be recognized by the government to be adequate for that purpose.<sup>58</sup>

After pointing out, in the quotation printed above,<sup>59</sup> that mere marriage was not a formal act of "direct statutory naturalization," and that neither

<sup>55</sup> 32 Fed. (2d) 911 (1929). Norway is a country with which the United States has a naturalization treaty. This fact was not referred to by the court.

<sup>56</sup> See cases *supra*, note 26. <sup>57</sup> 56 Fed. 556 (1893). <sup>58</sup> *Ibid.*, 558. <sup>59</sup> *Supra*, pp. 401, 402.

the Expatriation Act of 1868 nor the naturalization treaties had so provided, he added:

Nor does it seem to me that the act of Congress of February 10, 1855, (10 Stat. 604; Rev. St. § 1994), which provides that an alien woman by marriage with a citizen shall become a citizen, authorizes any inference that Congress meant to declare the converse, *viz.*, that a citizen woman by marriage with an alien should become an alien. The law is in such well-considered and guarded terms as to forbid any extension of it by implication . . . Therefore, as it seems to me, if inference is to be resorted to upon the subject, the motive on the part of Congress for making an alien woman a citizen by her marriage with a citizen would have been the very reason for its not intending the converse,—that a citizen woman by marrying an alien should become an alien.<sup>60</sup>

Judge Brown's decision in *Pequignot v. Detroit*,<sup>61</sup> rendered in 1883, ten years before *Comitis v. Parkerson*, to the effect that an alien woman who has once become an American citizen by marriage which is subsequently dissolved, may resume her alienage by marriage to a native of her own country, has not been sustained as sound by the later development of American law. To reach that conclusion, Judge Brown had to overrule the conclusion of *Shanks v. Dupont*, and did so because he thought he saw a change in American policy in the Act of 1855 (which, in fact, related only to alien women marrying American citizens and is an argument *against* the converse view) and in the Act of 1868 (making certain abstract declarations concerning expatriation). In fact, the Act of 1868 was not a naturalizing or expatriating statute, but was an expression of opinion by Congress dictated by certain political considerations which have ceased to exist, and has relation to an entirely different subject, namely, the effect of American naturalization on the original nationality of the person naturalized, which the United States deemed to involve complete denationalization. Judge Brown's view of what ought to be the law was dictated by his view of the public policy of the United States, which he expressed as follows:<sup>62</sup>

It will be noticed that legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative, at least for purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power.

Judge Brown naturally could not foresee the future; but the "advance" of legislation which he noticed has had an extraordinary checkmate. The advance has taken quite the opposite direction. While the law of 1907 did carry out Judge Brown's view as to policy, that law represents the nadir of the view and policy of merger of nationality. Since then, the view and policy have been completely reversed. The Acts of September 22, 1922, July 3, 1930, and March 3, 1931, indicate that the original view which prevailed prior to 1907,

<sup>60</sup> 56 Fed. 556, at 561.

<sup>61</sup> 16 Fed. 211 (1883).

<sup>62</sup> *Ibid.*, at 216.

namely, that marriage to an alien did not denationalize the American woman, is to be regarded as the considered view of Congress at the present time, and that the policy of the period between 1907 and 1922 is to be regarded as an aberration from the national policy.

In *Jennes v. Landes*,<sup>63</sup> the plaintiff, an American-born woman married to a subject of Canada and domiciled in Canada, invoked the jurisdiction of the Federal courts as an alien, alleging in her complaint that she "forsook and abandoned her allegiance to the United States" and "was then and is now a citizen of the province of British Columbia," and that under the laws of Canada she was a Canadian subject. The court assumed in its opinion that the "complainant is now, and at the time of commencing this suit was, naturalized in Canada, and permanently domiciled there." Under the circumstances mentioned, the court held Mrs. Jennes to be an alien, as she claimed, for purposes of invoking Federal jurisdiction against an American defendant. The question did not squarely arise whether she was not also an American citizen, which the court itself might have raised; but in view of her own statement that she had "abandoned her allegiance to the United States" and of the court's statement that she had been "naturalized in Canada," this may have been deemed unnecessary. Had these operative facts *not* existed, there would be no legal authority for concluding that she was not also an American citizen. The case is not very satisfactory.

*Ruckgaber v. Moore*,<sup>64</sup> involved the propriety of a legacy tax on a gift by a non-resident testatrix to a non-resident legatee. It was unnecessary to pass on citizenship. The court held that such a gift (an account against citizens of New York and shares of stock in New York corporations) was exempt from the tax under Section 29 of the War Revenue Act of 1898. As dictum, Judge Thomas expressed the opinion that an American woman married to a French citizen, domiciled in France, was a French citizen. He says:

By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the latter the citizenship of her husband; and this policy of three great powers, in connection with § 1999 of the R. S., which proclaims that expatriation is an inherent right, establishes that the political status of the wife follows that of the husband, with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage. Some serious objection to this, or even the opposite conclusion, exists, but it has been reached after due consideration of the subject and pertinent authority, including *Shanks v. Dupont*, 3 Pet. 243, 7 L. Ed. 666; *Pequignot v. Detroit* (C. C.) 16 Fed. 211; and *Comitis v. Parkerson* (C. C.) 56 Fed. 556.

This is judge-made law with a vengeance. Because the court finds that "three great powers" confer their nationality upon alien wives who marry

<sup>63</sup> 85 Fed. 801 (1898).

<sup>64</sup> 104 Fed. 947 (1900).

their citizens, the court concludes that the converse is equally true and that the political status of the wife always follows that of the husband. As already observed, such a consequence was distinctly avoided by the Act of 1855, which refers not to American wives marrying foreigners, but only to foreign wives marrying Americans. The court professes to find warrant in the Expatriation Act of 1868, to conclude that marriage to an alien expatriates an American woman. As already indicated, such a view is negated by two of the very cases Judge Thomas relies upon. Finally, the court reads into the act of "withdrawal" from the country "an election to renounce her former citizenship as a consequence of her marriage." There is no authority for such a view of American law. No statute attaches to removal and marriage abroad such a consequence as election to renounce American citizenship, and no court should read such an amendment into American law. It was possibly inspired by the views expressed by various Secretaries of State for many years, that they would not grant passports or extend diplomatic protection to American citizens who had resided for a long time in foreign countries, and was uttered at a time when the distinction between citizenship and protection was clouded in confusion. Indeed, it was not until the Circular Instruction of July 26, 1910, that the American native-born man who resided abroad for a long time was clearly admitted to be still an American citizen and entitled to American protection, it having been the view of the Department of State theretofore that there was something unworthy about long residence abroad on the part of American citizens. That view, with the industrial and commercial expansion of the country, has been abandoned, and with the Act of March 2, 1907, the distinction between citizenship and diplomatic protection is made somewhat clearer. Prior to that, even the Secretary of State had often said that an American citizen long resident abroad had lost his citizenship, when all that he really meant to say was that he had lost his right to diplomatic protection, quite a different matter.<sup>65</sup>

*Declarations of Secretaries of State.* Secretary of State Fish, in an instruction to Mr. Washburn, Minister to France, February 24, 1871,<sup>66</sup> kept the distinction clear. He said:

By the law of England and the United States, an alien woman on her marriage with a subject or citizen merges her nationality in that of her husband. *But the converse has never been established as the law of the United States*, and only by the Act of Parliament of May 12, 1870 . . . did it become British law that an English woman lost her quality as a British subject by marrying an alien. . . . The widow to whom you refer may, as a matter of strict right, *remain a citizen*, but, as a citizen has no absolute right to a passport. . . . I think it judicious to withhold passports in such cases unless the widow gives evidence of her intention to resume her residence in the United States. (Italics supplied.)

<sup>65</sup> See Borchard, *Diplomatic Protection of Citizens Abroad*, Secs. 326-328.

<sup>66</sup> Van Dyne, 133; Moore's Digest, III, 449.

A letter to the President dated August 25, 1873, without reference to any specific case,<sup>67</sup> speaks of such marriage of an American woman to a foreigner as placing her "out of the protection of the United States while within the territory of the sovereign to whom [she] has sworn allegiance." Later in the same letter Secretary Fish spoke of "divest[ing] her of her native character of an American citizen," but this must have meant protection, for the Secretary had admitted that there was no statutory authority for the conclusion that marriage of an American woman to an alien, even when residing abroad, changes her citizenship under American law.<sup>68</sup>

In a dispatch of 1874, Mr. Washburn, in addressing the Secretary of State, said:

Touching the question of citizenship, I consider her case analogous to that decided by you in your despatch [instruction?] dated February 24, 1871, where you decided that it would be judicious to withhold a passport in a case where an American woman had married a foreigner and her husband had thereafter died, unless she gave evidence of her intention to resume her residence in the United States.<sup>69</sup>

It would seem from some of the opinions occasionally expressed both by courts and the Executive that two facts now thoroughly appreciated, were not so clear in the period between 1860 and 1907. These are (a) that an American citizen by birth remains such forever, until by some affirmative formal act of naturalization abroad he had expatriated himself; and (b) that the mere fact that by marriage an American woman became a national of a foreign country by foreign law did not necessarily denationalize her as an American citizen—that she might in fact have dual nationality without inconvenience to the United States. The view that marriage to a foreigner denationalizes the American woman is nevertheless so often qualified as to indicate a lack of faith in the conclusion and a lack of firm grasp on the distinctions involved, including the distinction between citizenship and protection, between the acquisition of a foreign nationality by the husband's law and the continued enjoyment of American nationality by the woman under American law, and between the effect of long residence abroad and actual expatriation.

Secretary Fish, for example, in his instruction of September 22, 1875, to Mr. Williamson, Minister to Costa Rica, said:

But, although the marriage of a female citizen of the United States with a foreigner should make her a citizen of the country to which her husband belongs, it does not necessarily follow . . . that she becomes subject to all the disabilities of alienage, such, for instance, as inability to inherit or to transfer real property.<sup>70</sup>

Mr. Fish, addressing Mr. Rublee, Minister to Switzerland, under date of April 11, 1876, suggested that, while by the law of the United States an alien

<sup>67</sup> *Supra*, pp. 400, 401.    <sup>68</sup> For. Rel. 1873, pt. 2, p. 1187.    <sup>69</sup> For. Rel. 1874, pp. 408, 413.

<sup>70</sup> Moore's Digest, III, 451.

woman on her marriage with a citizen merges her nationality in that of her husband, it never has been "incontrovertibly established as the law of the United States that an American woman by marriage with an alien loses the quality of an American citizen."<sup>71</sup>

So Mr. Frelinghuysen, Secretary of State, in a note to Mr. Lewenhaupt, Swedish Minister, under date of April 10, 1882, said:

"As the statutes of the United States make no provision for expatriation of a female citizen," by her "marriage with an alien, it is possible that it may be held that" a woman in such a position "has a double nationality, so far at least as rights of property may be affected. On this point I can express no opinion."<sup>72</sup>

In 1869, a Mrs. Arana, born in the United States, had married a Spanish subject, and claimed that, by the death of her husband in 1883, her United States citizenship, notwithstanding that she was abroad, had revived. She applied in Salvador, in 1887, for a passport. Secretary of State Bayard, referring with approval to Mr. Fish's instruction of February 24, 1871, *supra*, held that Mrs. Arana, so long as she remained without the jurisdiction of the United States, was not entitled to the *privileges* of a citizen, so far, at least, as would entitle her to diplomatic protection against Salvador.<sup>73</sup>

On the other hand, Secretary of State Blaine, in an instruction to Mr. Phelps, Minister to Germany, February 1, 1890, said:

The view has been taken by this Department in several cases that the marriage of an American woman to a foreigner does not completely divest her of her original nationality. Her citizenship is held for most purposes to be in abeyance during coverture, but to be susceptible of revival by her return to the jurisdiction and allegiance of the United States.<sup>74</sup>

In an instruction to the United States Consul at Sagua la Grande, June 7, 1895, Acting Secretary Uhl said:

The view has been taken by this Department in several cases that the marriage of an American woman to a foreigner does not completely divest her of her American citizenship, but that the same is only suspended during coverture and reverts upon the death of her husband if she is residing in the United States, or upon her returning to this country if she is residing abroad.<sup>75</sup>

It was correct to say that the marriage of an American woman to a foreigner does not divest her of her original nationality. The explanatory words that "her American citizenship is . . . for most purposes . . . in abeyance during coverture" and is "susceptible of revival" or "reverts" after the death of the husband or return to the United States, do not accurately describe the legal status of the woman, as we now know. Her American citizenship is not in abeyance at any time, but continues to exist throughout the marriage.

<sup>71</sup> Moore's Digest, III, 453.

<sup>72</sup> *Ibid.*

<sup>73</sup> Sec. Bayard to Mr. Hall, Jan. 6, 1887, For. Rel., 1887, p. 92, Moore's Digest, III, 451.

<sup>74</sup> For. Rel., 1890, p. 301, Moore's Digest, III, 454.

<sup>75</sup> Van Dyne, Citizenship, p. 137.

Whether the United States wishes to extend her a passport or wishes to protect her under certain circumstances is a matter quite independent of the unalterable legal fact that she is not denationalized in any way by her marriage or residence abroad, and that she remains at all times an American citizen. There is no distinction in this respect between a native man and a native woman.

In 1898 the Department of State even ordered the American Minister in Cuba to extend protection to Mrs. Dixon, a native-born woman who had in 1872 married a British subject who died in 1884 while residing with his family in Cuba.<sup>76</sup>

In 1895, Mrs. Beatens, a native-born American woman married to a foreigner, applied for an American passport while sojourning in Germany. Mr. Olney remarked that "it has been the uniform practice of this Department to decline to grant passports to American women who are married to aliens. In my opinion, the Department would not be warranted in departing from this practice in the present case."<sup>77</sup>

Possibly this is an admission of Secretary Olney that the women in question were American women, but for reasons of policy the Department declined to issue passports. The continued American citizenship of such women has been reaffirmed by the Acts of September 22, 1922, and July 3, 1930; and even the policy of the Department in declining to issue passports has, in the light of these statutory expressions of policy, had to be altered, so that American passports are apparently now issued to American women who are married to foreigners. As already observed, naturalization treaties by which naturalization is recognized as involving expatriation from the original country have no relation to the legal effects of marriage. If there was any doubt on this point, it should have been removed by the Acts of September 22, 1922, and July 3, 1930.

#### CONCLUSION

This survey will, it is hoped, have demonstrated that American women who married aliens before 1907, whether they resided at home or abroad, did not thereby lose their American citizenship; that the Bancroft and subsequent naturalization treaties should not have been construed to effect expatriation or to demand recognition thereof by the United States; that the judicial and administrative rulings, while not free from ambiguity, justify the view that by the weight of authority such American women always remained American, in accordance with the common law; that the departure from this principle by the Act of 1907 gave rise to an emphatic repudiation of the aberration in 1922, 1930 and 1931, and that whatever doubts there may have been before 1907 or before 1922 should be resolved in the light of these positive expressions of Congressional intention and policy.

<sup>76</sup> Sec. of State Hay to Mr. Mesa Dec. 2, 1898, Van Dyne, 137.

<sup>77</sup> Mr. Olney to Mr. Morton, Oct. 26, 1895, Van Dyne, 138.

## ARMED NEUTRALITIES TO 1780

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It is frequently asserted even today that the armed neutrality formed by the Northern Powers in 1780 constituted the first organized effort by neutral states to secure freedom of navigation on the high seas.<sup>1</sup> Likewise, it is said that this league was promoted by Catherine II of Russia for the express purpose of protecting neutral rights.<sup>2</sup> Russia, however, was not primarily a maritime state, even as late as 1780, and the efforts to define in more precise language the rights and duties of such nations as remained at peace while others were at war had not been contingent upon her advent as a commercial nation. The process of defining such rights and obligations had been going on for generations before the reign of Catherine.

Aside from indicating a neglect of historical factors, the characterization of the league of 1780 as the First Armed Neutrality tends to perpetuate certain unfortunate interpretations of the relationship between neutrals and belligerents. In this view there is evidenced a disregard of the origin of the principles at issue in the controversies which often arose from this relationship. The importance of the Armed Neutrality of 1780 is overemphasized. More significant still, the impression is given that there was something extraordinarily illegal in the conduct of the belligerents of that period, some arbitrary practices which had not previously characterized their treatment of neutral trade and shipping. This view of the league points to the predominant naval power of the second half of the eighteenth century as the chief violator of neutral rights. Against England and the English prize court it lays the charge of heedlessly departing from the laws of modern warfare.

The Armed Neutrality of 1780 does not, however, represent the first organized effort by the neutrals to assert their rights upon the sea. Within the ninety years preceding that time not less than three armed leagues of neutrals had been established. As early as 1613 an alliance formed between Holland and Lübeck was in certain respects an armed neutrality. Moreover, prior to the forming of the two leagues in the last decade of the seventeenth century there had been individual protests and recriminations by several states against those belligerents whose maritime policy ran counter to the interests of their neighbors.

### RESISTANCE BY INDIVIDUAL STATES

Of such individual protests against measures adopted by the belligerents there are a number of instances. In the year 1575 Queen Elizabeth sent ambassadors to Holland to explain that her government could not allow the

<sup>1</sup> Carusi, C. F., and Kojouharoff, C. D., "The First Armed Neutrality" (reprint from the *National Law Review*, Vol. IX, No. 1).

<sup>2</sup> *Ibid.*

Dutch, then at war with Spain, to detain English ships which had sailed for Spanish ports.<sup>3</sup> Two decades later, when England was engaged in a war against Spain, Poland felt that her rights were violated. A Polish embassy was accordingly sent to England to complain that the law of nations was being infringed because English privateers and men-of-war were depriving Polish subjects of free commercial relations with the Spaniards.<sup>4</sup> After the Treaty of Vervins had reestablished peace between France and Spain in 1598, there began the long controversy between France and England relative to the right of the English to visit and search French merchant vessels bound for Spanish ports.

The middle of the seventeenth century witnessed two attempts on the part of neutrals to nullify the effect of regulations adopted by the belligerents. The Queen of Sweden in 1653,<sup>5</sup> during the war between England and Holland, and the States General in 1655,<sup>6</sup> during the war between England and Spain, made protest against the molestation of their shipping by belligerent privateers, and each took steps to protect its interest.

The method adopted by the Queen of Sweden recommended itself by virtue of its reasonableness. Her first object was to remove all causes for interference by the belligerents, so that neither the Swedish Government nor its subjects might be suspected of concealing or screening, under the pretext of free navigation, any ships or goods belonging to the enemy of either belligerent and there be furnished thereby "perhaps . . . a pretence for such molestations or insults as our subjects have been exposed to; under the color of which suspicion some have hindered till this very time and obstructed the navigation and trade, not only of their enemies, but also of others that are neutral." Accordingly, it was ordained that such vessels as desired to come under the special protection of the government must carry only the goods of Swedish subjects.<sup>7</sup> The Queen's second step involved the establishment of a convoy system. In order to prevent fraud or clandestine designs to conceal enemy property, the passes and certificates of all vessels applying for the protection of a warship were to be examined by the admiral or the commander of the convoy. Fraudulent abuse of the convoy regulations should incur the penalty of confiscation to the Crown of the property involved.<sup>8</sup>

Definite rules were also issued to govern the conduct of the Swedish convoy commander while upon the high seas. If he should chance to meet belligerent warships, he was to give evidence of his authority but refuse all demands that

<sup>3</sup> Grotius, *De Jure Belli ac Pacis Libri Tres* (Kelsey trans. 1925), Bk. III, Ch. 1, Art. 5, Sect. 4.

<sup>4</sup> *Ibid.*

<sup>5</sup> Thurloe, *Collection of State Papers* (1747), I, p. 224; Robinson, *Collectanea Maritima* (1801), p. 145 ff.

<sup>6</sup> Thurloe, *op. cit.*, II, p. 504 ff.

<sup>7</sup> *Ibid.*, I, p. 424 ff.

<sup>8</sup> If the master of the ship under convoy was party to an attempt to violate the convoy rules he was to be held liable to forfeiture of his property in the ship. If he was not the owner or part owner he was to be kept in custody until he had redeemed himself by the payment of a sum of five hundred dollars.

the vessels under his protection submit to be searched. Since the only purpose of the convoy was to prevent inconveniences and clandestine dealings, it was expected that the ships would be allowed to proceed on their course unmolested. On the other hand, Swedish warships were enjoined not to protect merchant vessels bound to belligerent ports.<sup>9</sup>

The States General of Holland also, in their measures to prevent visitation and search of Dutch merchantmen, had recourse to the convoy system, hoping by this means, according to Thurloe, "to draw all trade to themselves and their ships."<sup>10</sup> The immediate result of this policy was an encounter in 1656 between certain English privateers and some Dutch vessels under De Ruyter, who was convoying a number of merchantmen from Spain. Such an attempt to limit the rights of belligerents to intercept neutral trade with the enemy was but a passing phase of seventeenth century naval policy, and was presently discarded when Holland was again a belligerent. In the War of the League of Augsburg she freely seized neutral merchantmen suspected of carrying supplies to the enemy, even when such vessels were proceeding under the protection of convoys.<sup>11</sup>

#### THE ARMED NEUTRALITY OF 1613

The preceding are illustrations of attempts made by individual states to challenge the right of belligerents to interfere with their neutral commerce. What were probably the first concerted measures to protect neutral trade were those taken at the beginning of the seventeenth century against what were termed the arbitrary regulations of Denmark, at that time the most powerful naval state in the Baltic.

The Danish regulations, unnecessarily severe in time of peace, became particularly stringent in time of war. For a period of nineteen months beginning with March, 1611, the country was at war with Sweden, and during this period its maritime policy restricted unduly the trade of neutral countries, particularly Lübeck and Holland.<sup>12</sup> Denmark interdicted all trade with Sweden, and employed her naval power to prevent the armed merchantmen of Lübeck from entering Swedish ports. The Dutch she likewise subjected to various restrictions, both in respect to the Sound dues and to the trade with the Swedes.

This rigid practice gave rise to coöperation between Holland and Lübeck.

<sup>9</sup> No restrictions were placed upon those Swedish merchants who desired to carry on their trade with either belligerent without convoy.

<sup>10</sup> Thurloe, *op. cit.*, II, p. 504. Cf. Mirbach, *Die Völkerrechtlichen Grundsätze der Durchsuchungsrecht zur See* (1903), p. 74.

<sup>11</sup> "Kong Christian den Femtes egenhaendige Dagböger," entries for December, 1689 and February, 1690, in *Nyt Historisk Tidsskrift* (1847). This work is hereafter cited as Jour. Chr. V.

<sup>12</sup> Dumont, *Corps universel diplomatique du droit des gens* (1726-1731), V, part 2, p. 231, hereafter cited as Dumont.

Their formal treaty was not signed until after the war was terminated, but their coöperation was facilitated by the situation resulting from the war. Under the influence of English mediators, Sweden and Denmark signed the peace treaty of Knaeröd on January 20, 1613. The outcome of the war left Denmark able to maintain her position as the predominant power in the North, so that her customary maritime policy remained a potential danger to other commercial nations. In May, 1613, Holland and Lübeck therefore entered into a formal treaty agreement for the purpose of protecting their trade in the Baltic and North Seas, evidently desiring to be prepared to take more vigorous action should another war break out in the North.<sup>13</sup>

The language of the treaty indicates that the alliance between Holland and Lübeck might properly be called the first armed neutrality, as has been suggested by Boye.<sup>14</sup> Article 1 defined the object of the league, declaring that the law of nations gave to the subjects of each party the right of free navigation and commerce in the North Sea and in the Baltic, and that the two Powers aimed to protect that right from infringement by a third Power. To achieve that purpose it was specified in Article 5 that those who joined the league should make contributions in money, vessels, infantry, and cavalry, to such an extent as time and circumstances might require. In Article 6 it was agreed that if those who were interfering with commerce and navigation in the North did not upon friendly request discontinue that unlawful practice, the members of the league were to take measures for vigorous defense of their rights. Article 7 contemplated a resort to arms, and the proper method to be followed in that case, while Article 14 made provisions for adherence to the league by other princes, countries, and cities.<sup>15</sup>

#### DANO-SWEDISH POLICY, 1648-1689

Within the next decade the relative position of the Northern Powers was changed by the rise of Sweden under Gustavus Adolphus to predominance among them. By 1629 the Baltic had become a Swedish sea. It was now the King of Sweden rather than the King of Denmark who looked askance at foreign vessels in the Baltic. The new Swedish policy was a direct challenge to Denmark, but the events of the Thirty Years' War served to postpone the conflict between them until 1657.<sup>16</sup>

Until nearly the close of the Thirty Years' War the practice of the two Scandinavian states had been to interdict all trade between neutrals and the

<sup>13</sup> Dumont, *Corps universel diplomatique du droit des gens* (1726-1731), V, part 2, p. 231, Arts. 1, 5, 6, 7, 14.

<sup>14</sup> Boye, *De Vaebnede Neutralitetsforbund* (1912), p. 32.

<sup>15</sup> Sweden joined the league in 1614. See Dumont, V, part 2, p. 245, and *cf. ibid.*, pp. 274, 276.

<sup>16</sup> But see the Dano-Swedish treaty of 1645, in Dumont, VI, part 1, pp. 291, 292.

enemy.<sup>17</sup> In 1645, however, Denmark conceded that Dutch subjects might carry on their trade with Sweden, except in contraband goods and to ports under blockade,<sup>18</sup> and in 1657 the Dutch were again able to obtain that privilege. Sweden likewise changed her policy.<sup>19</sup> The Anglo-Swedish treaty of 1664 provided only that it would be unlawful for either of the signatories to give any aid to the enemies of the other.<sup>20</sup> A similar agreement had already been signed by Sweden and Holland.<sup>21</sup> These more liberal arrangements indicate the abandonment of the principle of general interdiction of trade with the enemy.

During the war of 1657-1660 Denmark enforced stringent regulations upon neutral trade,<sup>22</sup> and Sweden did likewise. Three of the other maritime nations, France, Holland, and England, entered into an agreement to protect their interests and to end the war.<sup>23</sup>

Peace was concluded in 1660. In the outlook of Scandinavian statesmen and in the attitude of the Scandinavian peoples toward each other and toward the rest of the world there was a gradual transformation, the result of which was to affect the relationship of neutrals and belligerents in the last war of the century. Despite the seemingly irreconcilable interests of the two states, a number of substantial men began to see the folly of the ever-recurring wars between Denmark and Sweden. Efforts were made for a Scandinavian *rapprochement* and for coöperation in respect to the other maritime Powers.<sup>24</sup> This changed attitude made it possible to produce the temporary Dano-Swedish armed leagues of 1691 and 1693.

The foundation of that coöperation was laid in the period of thirty years following 1660. During this time there were concluded a number of treaties between each of the Scandinavian states and other governments. Of greater significance to the promotion of neutral solidarity were the many negotiations which were carried on between Stockholm and Copenhagen. Thus in 1672, while France, supported by England, was at war with Holland, the Scandinavian states were beginning to discuss seriously the matter of concerted action for the protection of neutral interests.<sup>25</sup> Their negotiations had no immediate result, but the complaints then made of violation of treaties on the part of the belligerents, of unjustifiable seizure of neutral merchantmen, and of the subsequent long and costly litigations in the prize courts were to recur in the list of grievances drawn up by every armed league formed thereafter. The fertile suggestion made by Sweden that the neutral states should

<sup>17</sup> Cf. Söderquist, *Le blocus maritime* (1908), pp. 230-253. Relaxations were granted in the treaty of 1640 between Sweden and the Netherlands. See Dumont, VI, part 1, pp. 192, 193.

<sup>18</sup> Boye, *op. cit.*, p. 38, n. 1.

<sup>19</sup> *Ibid.*, p. 43, notes 4, 5.

<sup>20</sup> Dumont, VI, part 2, p. 80, Art. 11.

<sup>21</sup> *Ibid.*, part 1, p. 192.

<sup>22</sup> Cf. the Danish ordinance of 1659 in Robinson, *Collectanea*, p. 176.

<sup>23</sup> Dumont, VI, part 2, p. 252. Cf. Boye, *op. cit.*, pp. 41-44.

<sup>24</sup> Cf. Hannibal Sehested's "political testament" in Boye, *op. cit.*, p. 47.

<sup>25</sup> *Ibid.*, p. 49, n. 3.

seize and confiscate ships and merchandise belonging to the subjects of a belligerent country whose privateers were injuring neutral trade was to bear fruit during the last war between France and Holland in the seventeenth century.

By 1675 both Denmark and Sweden had become involved on opposite sides in the conflict between France and Holland. In the negotiations for peace, which were carried on at Lund in 1679,<sup>26</sup> renewed efforts were made to establish future harmony between the Courts of Stockholm and Copenhagen and to formulate a policy which would enable them to cooperate as neutrals in the event of another war between the greater maritime Powers. After the conclusion of peace they signed a treaty of alliance also.

The latter treaty contained certain significant stipulations. The contracting Powers agreed that they would cooperate, even to the extent of employing force, in matters of trade and navigation in time of war between other countries, and that neither would conclude any alliance which might prejudice the commerce of the other. Since it was believed that the trade of certain towns of the Empire was flourishing at the expense of Scandinavian merchants, there was included in the treaty a secret article providing that by means of appropriate navigation laws this trade should be diverted to Danish and Swedish ports. Moreover, it was stipulated in Article 19 that if either party should be at war the one remaining neutral should close its harbors to the ships of the enemy of the other. That is to say, Sweden and Denmark adopted an indirect method of interdicting trade between a neutral and a belligerent country. This treaty was to remain in force for ten years.<sup>27</sup>

#### THE CONVENTION OF LONDON OF 1689

The Dano-Swedish treaty of 1679 was still in force and the attitude toward Scandinavian cooperation manifested therein still obtained when the War of the League of Augsburg commenced in 1688. Since in that war the naval forces of England and Holland were brought together in a common endeavor, the neutral states might expect their trade with the belligerents to be subjected to more stringent supervision than in any previous war. That expectation was soon to be realized.

In August, 1689, the Convention of London was signed, whereby Holland and England undertook to prohibit trade between France and other countries.<sup>28</sup> The convention provided that, as several states of Europe were then engaged in war against France, and already had prohibited or would in a short time prohibit all commerce with that country, the Allied Powers should employ their naval forces to carry out similar prohibitions. This section of the convention probably did not affect directly the trade of neutrals, but in Article 3 it was agreed that those states which remained at peace with France should be notified that if their merchant vessels were found at sea before the

<sup>26</sup> Dumont, VII, part 1, p. 525.

<sup>27</sup> *Ibid.*, p. 431.

<sup>28</sup> *Ibid.*, part 2, p. 238.

neutral states had become acquainted with the new regulations they would be obliged to turn back. If after the notification had been given, neutral subjects should attempt to carry enemy property to France, their ships and cargoes would be condemned as lawful prize to the captor.<sup>29</sup>

The arbitrary nature of this Anglo-Dutch agreement and its evil effect upon neutral trade have been frequently overemphasized.<sup>30</sup> In some respects, indeed, the convention reverted to the ancient practice of interdicting all commerce with the enemy, but this was a practice not foreign to Scandinavian policy. Until the middle of the seventeenth century the Scandinavian sovereigns had generally employed such interdictions during belligerency, and in 1679 had provided for them in their treaty of alliance.<sup>31</sup> They were again to employ such measures in their wars of the eighteenth century. As neutrals in 1689, however, they could not subscribe to the view of Samuel Pufendorf that they should, by refusing to heed the avaricious urging of their subjects for increased trade, refrain from interfering with the designs of the Allied Powers to reduce within proper bounds an insolent and exorbitant nation which was threatening Europe with slavery and the Protestant religion with destruction. On the other hand, they could not escape the truth of the conclusions drawn by the same author that the matter of trade and navigation did not depend upon rules founded by a general law, but rather upon conventions made between particular nations, so that to form a solid judgment of the point in question "we ought previously to examine what conventions subsist between the Northern Crowns and England and Holland, and whether the latter Powers have offered the former just and reasonable conditions."<sup>32</sup>

The terms of the several conventions between the Northern states and other Powers were not the same, so that by regulating its general maritime policy by the stipulations of one of these conventions a government would not be able to conform to those of another. The treaties which governed the commercial relations of England with Denmark<sup>33</sup> and Sweden<sup>34</sup> respectively followed the principles of the *Consolato del Mare*. These were probably not violated by the agreements in the Convention of London. The treaties which subsisted between Sweden and Holland,<sup>35</sup> however, and between each Scandinavian state and France,<sup>36</sup> followed the converse principle that free ships should make free goods, and these were certainly disregarded by the conven-

<sup>29</sup> Cf. Twiss, *Law of Nations in Time of War* (1875), p. 259.

<sup>30</sup> Cf. the Danish ordinance of 1659 in Robinson, *Collectanea*, p. 176.

<sup>31</sup> Dumont, VII, part 1, p. 431, Art. 19.

<sup>32</sup> Letter to Groningius, in Pufendorf, *De Jure Naturae et Gentium* (1749), Bk. VIII, Ch. 6, Sect. 8, n. 1.

<sup>33</sup> Anglo-Danish treaty of 1670, Dumont, VII, part 1, p. 132, Art. 20 and passport.

<sup>34</sup> Anglo-Swedish treaty of 1661, *ibid.*, VI, part 2, p. 384, Art. 12 and passport.

<sup>35</sup> Swedish-Dutch treaty of 1679, *ibid.*, VII, part 1, p. 432, Art. 22.

<sup>36</sup> Franco-Swedish treaty of 1672, *ibid.*, p. 166, Art. 23.

tion. These facts explain why the King of Denmark made no comment in the daily entries of his Journal, no adverse criticism, upon being notified that Holland and England had decided to forbid neutrals, under given conditions, to trade with France. He apparently accepted the regulations of August as a matter of course.<sup>37</sup>

Presently Denmark resorted to measures of reprisal. The manner in which these measures were applied indicates that it was not the convention between England and Holland but the great number of privateers fitted out by each belligerent that caused the greatest impediment to neutral trade. These followed the routine practices of other wars, but, as they were more numerous than formerly, the effects of their activity were more keenly felt. French privateers appeared in the northern seas and operated in Danish territorial waters; <sup>38</sup> those of the Allies were equally active, but were probably less given to seeking their prey under the protection of the neutral coast, as they were supported by greater naval forces.

There is no rule by which to measure the relative degree of violation of treaty provisions and general principles of maritime law committed alike by belligerent privateers and by neutral traders. There is no means by which to judge the merit of the contentions of each party in this conflict. The fact is that those who now remained at peace felt aggrieved. They believed their freedom of navigation to be unduly restricted, and they took steps to protect their interest. In this they were perforce motivated by political considerations as well as by the desire to establish general principles of international law.

During the War of the League of Augsburg, and during every war thereafter in which they negotiated for the establishment of a league of armed neutrals, the policy followed by the Northern Powers was consistent in general principle, although in detail it varied greatly. Its key may be found in the Journal of Christian V of Denmark.<sup>39</sup>

The entries in the King's Journal for 1690 indicate that Denmark was carrying on simultaneously negotiations with not fewer than six of the chief states of Europe, the result of each effort being contingent upon the probable success of the others. The negotiations with England centered at first in the matter of supplying Danish troops for service in Ireland, later in the question of a defensive alliance. Those with Holland were concerned with the question of an alliance, at first only defensive, later even offensive. The conversations carried on conjointly with these Powers dealt with the question of commerce and navigation and with that of neutral trade with the belligerents. With France Denmark aimed to effect a treaty of neutrality and subsidy.

<sup>37</sup> Jour. Chr. V, *loc. cit.*, entries for August, 1689.

<sup>38</sup> Danish instructions to the Stadholder in Norway, in Boye, *op. cit.*, p. 55, n. 1.

<sup>39</sup> The value of the Journal lies not alone in its record of the events of each day, but in its revelation of the motives which guided the King in his policy toward other states.

At Stockholm the Danish ambassador bent his efforts to the task of renewing the treaty with Sweden of 1679, and when that had been accomplished, to the establishment of an armed neutrality. The relationship of Denmark with Brandenburg and with the Empire was likewise a matter of diplomatic bargaining. During the year in which these negotiations were in progress the King was weighing the relative advantages for Denmark of peace and of war, and was directing his policy accordingly.<sup>40</sup>

The first tangible result of these negotiations was recorded in February. The Dano-Swedish treaty of 1679 was renewed for a period of five years. The immediate effect of the reestablished alliance with Sweden was the adoption of a joint convoy system. Danish and Swedish warships were to escort neutral merchant vessels, but only between Scandinavian ports and other neutral places, or, at least in the case of Danish warships, to Scotland, whence the merchantmen might ply their way unescorted around the British Isles to their destination in France or beyond.<sup>41</sup> The commanders of the warships were enjoined not to allow belligerents to visit and search any vessel in the convoy. In this respect the Scandinavian rulers were following the example set by Queen Christina a generation earlier.

Encouraged by their treaty of 1690, both Denmark and Sweden assumed a bolder attitude in their relations with the belligerents. Denmark followed the suggestion made by Sweden in 1673 and adopted measures of reprisal, seizing Dutch ships in Danish harbors and territorial waters.<sup>42</sup> Her aim was to hold these as compensation to Danish subjects for losses inflicted upon them by Dutch privateers. When the Dutch ambassador protested against the injustice of such strange action by a neutral, he was told that the ships would be freed immediately if the States General would agree to repair the injury suffered by the Danish merchants.<sup>43</sup> During the ensuing negotiations with Holland relative to neutral trade with France the King believed that his policy would prevail. In this he was encouraged by Louis XIV, and likewise by the King of Sweden, whose problems were identical with his own.<sup>44</sup>

#### THE ARMED NEUTRALITY OF 1691

The events of 1690 and 1691 led directly to the establishment of an armed neutrality and to the conclusion of a treaty to compose the differences between Denmark and the Allied Powers, Holland and England. After the Dutch ships were apprehended in December, negotiations were immediately initiated between Denmark and Holland.<sup>45</sup> The two countries sought to reach a compromise whereby the Dutch ships might be released, the matter

<sup>40</sup> Jour. Chr. V, *loc. cit.*, entries Jan. 9 to Feb. 10, 1690, *passim*.

<sup>41</sup> *Ibid.*, December, 1689, to March, 1690, *passim*.

<sup>42</sup> *Ibid.*, December 12, 1690.

<sup>43</sup> *Ibid.*, December 12, 19, 30, 1690.

<sup>44</sup> *Ibid.*, cf. the Franco-Danish treaty of 1691, in Boye, *op. cit.*, pp. 65-66.

<sup>45</sup> Jour. Chr. V, *loc. cit.*, Dec. 12, 1690.

of neutral trade with France placed on a satisfactory basis, and the question of alliances finally settled. To find a solution for these problems proved difficult. The Dutch made various proposals, offering first to allow forty-five Danish vessels to trade with France, and somewhat later to make a money payment as compensation to those Danish merchants whose ships had been seized. The progress of these negotiations seemed unsatisfactory, and Denmark turned again to Sweden,<sup>46</sup> concluding with that country a treaty of armed neutrality on March 10, 1691.<sup>47</sup> A few days later came her treaty of neutrality with France,<sup>48</sup> and in June the Treaty of Copenhagen, which composed the Danish difficulties with Holland and England.<sup>49</sup>

In the treaty establishing the Armed Neutrality of 1691 Denmark and Sweden agreed upon a method of action to be followed, separately and conjointly, in their relations with the belligerents. They were to cooperate in protecting their common interest. Freedom of navigation was to be maintained in conformity with the stipulations of their several treaties with other countries and with the law of nations. In the event the subjects of either party should suffer any inconvenience or damage from the visitation and seizure of their vessels by the belligerents, compensation was to be demanded, and if that demand should meet with refusal the contracting Powers were to resort to reprisals. The treaty provided for joint action in the event the pursuit of this policy of reprisals should lead to open hostility between one of the confederates and a belligerent. Each undertook to equip convoys of warships for the protection of the shipping of both countries, and likewise to assist the other in case such convoys should be attacked or molested.<sup>50</sup>

Such was the plan for concerted action adopted by the Armed Neutrality of 1691. It probably had but little effect upon the naval policy of the belligerents. France did not restrict the activity of her privateers, and the Allies, disregarding the convoys, continued to seize neutral vessels. Moreover, the sum of 135,000 Riksdalers which the Dutch had offered as compensation for the injuries suffered by Danish subjects was not paid. After two months of subsequent negotiations with Holland, Denmark accepted a payment of only 80,000 Riksdalers.<sup>51</sup>

The difficulties which disturbed the relations between Denmark and the Allied Powers were temporarily composed by the Treaty of Copenhagen of June and December, 1691.<sup>52</sup> By this agreement Denmark was to discontinue the practice of detaining as a measure of reprisal the ships and cargoes of those subjects of Holland and England who were trading with ports in the Baltic region or in Western Scandinavia. In the future she would resort to

<sup>46</sup> Jour. Chr. V., *loc. cit.*, December, 1690, to March, 1691, *passim*.

<sup>47</sup> See Boye, *op. cit.*, p. 64. <sup>48</sup> *Ibid.*, pp. 65-66. <sup>49</sup> Dumont, VII, part 2, p. 292.

<sup>50</sup> See Boye, *op. cit.*, p. 64. Further to protect neutral trade, provision was made for fitting out warships for ordinary cruising.

<sup>51</sup> Jour. Chr. V, *loc. cit.*, April 9, 11, 23, and May 22, 1691.

<sup>52</sup> Dumont, VII, part 2, pp. 292, 294.

such reprisals only after the lapse of four months following a refusal by the belligerents to satisfy a formal demand for reparation. She agreed also to prevent French privateers from operating in her territorial waters. Article 5 of the treaty contained the significant stipulation that in order to eliminate unfair practices the Danish Government was to take greater care to prevent fraud in the granting of naturalization papers and other documents to alien individuals who operated to the prejudice of the neutral trader. To facilitate trading between Denmark and France it was provided in Article 3 that Danish vessels were not to carry enemy property or to engage in the coastal trade of France, but were to sail directly from their own ports to a designated place in the enemy country. Subject to these restrictions, Denmark was to enjoy the right to carry on trade with the enemy of the Allied Powers.

Neither the establishment of the Armed Neutrality of 1691, which proposed to employ military force, nor the Treaty of Copenhagen, however, could solve the problems arising from the irreconcilable interests of neutrals and belligerents. Belligerent privateers did not discontinue their activity; neutral merchantmen failed to observe the stipulations of treaties intended to exterminate collusive trade;<sup>53</sup> and the neutral governments sought to employ convoys,<sup>54</sup> although with no more success in that effort than in their attempt to prevent fraud among their own subjects. Notwithstanding the stipulations of her treaty with the Allied Powers, Denmark again proposed to employ her former method of reprisals. The better to achieve this end the Danish Government presently instructed its minister at Stockholm to reopen negotiations for the coöperation of Sweden, which had been interrupted after the Treaty of Copenhagen.

#### THE ARMED NEUTRALITY OF 1693

That policy met with the approval of the Swedish Government, and the negotiations resulted in the establishment by the treaty of March 17, 1693,<sup>55</sup> of the second armed neutrality between Sweden and Denmark. The first article of the treaty contained certain singular provisions, which were to reappear in a modified form in the course of the following century. Notwithstanding the fact that the majority of commercial treaties contained stipulations recognizing the jurisdiction of the belligerent admiralty courts, the competency of such courts to adjudicate prize cases was here denied, and the ambassadors of the treaty Powers were nominated to discharge that function. They were jointly to evaluate the damages which had been inflicted by belligerent agencies upon the subjects of Denmark and Sweden, and to present on the basis of that evaluation a demand for complete reparation in such cases as had already been adjudicated. They were also to require the unconditional release of ships and cargoes which were being detained pending trial

<sup>53</sup> Marsden, *Documents Relating to Law and Custom of the Sea* (1915-1916), II, p. 148 ff.

<sup>54</sup> Boye, *op. cit.*, p. 72.

<sup>55</sup> Dumont, VII, part 2, p. 325.

in the prize courts. Articles 2, 3, and 4 were designed to force compliance with the neutral demand. In the event satisfaction should not be immediately forthcoming, Denmark and Sweden were to seize from the subjects of the unyielding belligerent a sufficient number of ships to compensate the injury suffered by the neutral traders and to defray the expenses of the process of seizure. An embargo forbidding all commercial intercourse was to be applied to the nation against which measures of reprisal were taken.

The treaty contained other significant stipulations. It was agreed in Article 7 that vessels belonging to a belligerent which complied with the wishes of the neutrals should not be seized and sold in the harbors of either contracting party. Article 8 made the charge that the Spanish naval policy had resulted in great injury to neutral commerce. In this case reparation was to be exacted, but since Spain had only a limited trade in Northern Europe the ordinary methods of reprisal were precluded. It was proposed therefore to search all approachable vessels for Spanish merchandise, even to the extent of searching those seized in reprisals against other nations. Also included were the provisions of the treaty of 1691 respecting the convoy system and the resort to military force under given circumstances.

The aim of the Armed Neutrality of 1693 failed of realization, as had that of 1691. The combined naval forces of England and Holland were too predominant to yield to the pressure of the neutrals. Toward the end of the War of the League of Augsburg Denmark reached a compromise with the Allies, by which in return for a relatively small sum of money she agreed to discontinue trading with France. When the war was terminated by the Treaty of Ryswick in 1697 the question of neutral trade with the belligerents was again in abeyance.

The armed neutralities of the seventeenth century were designed primarily to promote the commercial interest of the neutrals, although their avowed programs included a general reference to treaties and to the law of nations. Every one of them, including the league of 1613, proposed to establish freedom of navigation and commerce in accordance with the law of nations and with the provisions of the treaties which governed the relationship of each party with other nations. Yet no attempt was made to define the law or to find a common formula for the conflicting principles of the various treaties. There was only a summary statement that the treaties and the general law were being violated by the belligerents; there was no reference to the questionable practices of the neutral trader.

Such general assertions as these were carried over in the armed neutralities of the eighteenth century. In the programs set forth by these later leagues there were incorporated several pronouncements from the Dano-Swedish treaties of 1691 and 1693. Of these the most significant dealt with belligerent privateers, the matter of establishing a convoy system and the related question of visit and search, the competency of belligerent prize tribunals, and the

delay and expense involved in protracted prize litigations. There was also the question of creating a united naval armament to enforce the program advocated by the league. These points served as the basis for the formula drawn up by A. P. Bernstorff in 1778 and later adopted by the league formed in 1780.<sup>56</sup>

#### REGULATIONS DURING THE GREAT NORTHERN WAR

That the nations which united to form the armed neutralities were indifferent to questions of international law, except in so far as the enforcement of that law served to advance their immediate commercial interest, is indicated by the naval policy which each of them followed while at war. Close upon the dissolution of every armed neutrality, whether in the seventeenth century or in the eighteenth, followed the repudiation by its member states of the principles which they had advocated when as neutrals they were negotiating for a confederacy to protect their trade. Illustrations of this policy are afforded in the regulations issued by those same states when they assumed the status of belligerency.

The regulations of the Great Northern War are pertinent. Denmark and Sweden became embroiled in hostilities against each other in 1709, and each issued regulations for the guidance of its privateers and men-of-war. The Danish ordinance of 1710<sup>57</sup> contained the rule that enemy property on board neutral ships should be good prize. This rule conformed to the provisions of the Anglo-Danish treaty of 1670, but was the converse of the principle contained in the Danish treaties with France and Holland respectively. In its specific provisions, however, this ordinance imposed more severe penalties upon neutral shipping than those prescribed by the treaty with England. Article 4 provided that neutral ships were to be condemned as good prize under the following conditions of violation of good faith: (a) sailing for a port in Sweden or in a province under the control of Sweden, (b) sailing without regular passports and other required papers, (c) pursuing a course other than that provided for in the passport, (d) carrying merchandise not listed in the bills of lading, and (e) having a lading partly or wholly of contraband of war. In the enumeration of contraband goods in Article 5 both naval stores and provisions were included. These regulations were not less severely restrictive upon neutral trade than were those enforced by Holland and England in the War of the League of Augsburg.<sup>58</sup>

The Swedish navigation ordinance of February, 1715,<sup>59</sup> was similar to the Danish. It granted prize commissions to foreigners, provided for adjudica-

<sup>56</sup> See Holm, "*Om Danmarks deltagelse i Forhandlingerne om en Vaebnet Neutralitet fra 1778-1780*," in *Dansk Hist. Tidss.* (1865). <sup>57</sup> See Boye, *op. cit.*, p. 77, n. 3.

<sup>58</sup> Cf. English instructions against France of 1693, Marsden, II, pp. 414-419.

<sup>59</sup> Lamberty, *Mémoires pour servir à l'histoire du XVII<sup>me</sup> siècle* (1724-1740), IX, p. 226; Robinson, *Collectanea*, p. 167.

tion of prizes in local tribunals, although the competency of belligerent tribunals had been denied in the Armed Neutrality Convention of 1693, and confiscated vessels which were not properly provided with passes, or which violated the specifications of such passes, and those which were bound to prohibited ports in the Baltic. Enemy property on board neutral vessels was to be good prize to the captor, notwithstanding the opposite provisions of Sweden's treaties with France and Holland. Upon capture, all goods not covered by regular bills of lading and all vessels which positively deviated from the regular course to their given destination were to be declared forfeited. Finally, a vessel with more than one-fourth of its crew natives of the enemy country was likewise to be subject to condemnation.

The ending of the Great Northern War in 1721 marked the close of a characteristic cycle of armed neutralities, for during the thirty years preceding, the actions of Denmark and Sweden had stood as an example of the manner in which states as militant neutrals were inclined to unite for concerted action, and likewise of the method by which the same states as belligerents were wont to place restrictions upon certain classes of neutral trade. Not the advancement of principles of international law, but their immediate commercial interest was their motive. In the various treaties of peace now concluded by the Northern Powers no reference was made to the questions raised by the members of the Armed Neutralities of 1691 and 1693, nor to the principles which the same nations had been seeking to enforce while engaged in the war just ended.

#### THE ARMED NEUTRALITY OF 1756

The middle decades of the eighteenth century witnessed the first of another series of the great naval wars of Europe, with France and England the chief participants. Between Denmark and Sweden there was in this period neither open hostility nor effective coöperation save for a brief time in 1756. The influence which France exerted upon the policy of the Scandinavian Courts was of greater weight during this period than it had been during the War of the League of Augsburg.<sup>60</sup> Indeed, French ascendancy at Stockholm sufficed to inveigle Sweden into the war with Prussia in 1757, and at Copenhagen French counsel was hardly less prééminent.<sup>61</sup> By a treaty of 1754 France agreed to pay Denmark a yearly subsidy of 200,000 Dalers, and each party promised to assist the other with military and naval forces whenever it should be attacked by a third Power.<sup>62</sup> Denmark was able to remain at peace, however, while Sweden became involved in the war. It was this situation which precluded any but a temporary concert between them in this period.

Denmark was able to maintain her neutrality in the Seven Years' War

<sup>60</sup> Flassan, *Histoire générale et raisonnée de la diplomatie française* (1809), VI, p. 75.

<sup>61</sup> *Ibid.*, p. 113; Boye, *op. cit.*, p. 105 ff.

<sup>62</sup> *Danske Tractater, 1751-1800* (1882), p. 80.

largely because J. H. E. Bernstorff, the Foreign Minister, persuaded Versailles that his country would be of greater service to France as a neutral. French statesmen readily concurred in that view and began to urge Denmark and Sweden to adopt concerted action for the protection of their trade and shipping, and, incidentally, of the transportation of military stores to France. The Courts of Copenhagen and Stockholm needed little urging. Indeed, they did not even await the commencement of hostilities before engaging in negotiations. By March the preliminaries were sufficiently advanced for Sweden to make proposals for a concert, and on July 12 a convention was signed at Stockholm establishing the Armed Neutrality of 1756.<sup>63</sup>

The divergence of policy of the two countries, except in the matter of navigation and trade, together with the military ambition of Sweden, operated to make this league innocuous. The views which each party advanced in the course of the negotiations had greater significance for subsequent developments than had the specific provisions of the convention itself.

Of the two Powers Sweden, leaning more heavily on the support of France, manifested the more militant attitude toward England. Forgetting her own severe regulations during the Great Northern War and in 1741,<sup>64</sup> she wished to insist upon the vindication of the principle that free ships should make free goods. In Denmark the cautious Bernstorff succeeded in convincing the Government of Sweden that it would be unwise to insert that principle in the proposed treaty, although he did not contemplate its abandonment. It was his belief that "the two Powers should insist upon this principle against England and strive to obtain its recognition. If this principle should not be accepted, the Danish Government would be free to demand restitution from the English Government or to remain inactive, as existing contingencies and the national interest should require."<sup>65</sup>

There were other important issues under discussion. Sweden desired that visit and search of neutral vessels should be limited to the ships' papers only, but no agreement was arrived at on that point. Nor were the negotiators in a position to declare that ships which sailed under convoy should be immune from visitation. In the matter of contraband the contracting parties declared themselves prepared to be governed, not by the provisions of their own treaties, but by the classification in the Anglo-Danish commercial treaty signed at Utrecht in 1713 after the conclusion of the War of the Spanish Succession.

During the Seven Years' War the customary irregularities occurred. Some neutral traders engaged in collusive trade; some belligerent privateers exceeded the bounds set by their instructions. There followed the customary

<sup>63</sup> *Danske Tractater, 1751-1800* (1882), p. 80.

<sup>64</sup> When she became involved in the war against Russia. Cf. Boethius, *Sveriges Traktater med Främmande Makter*, VIII, part 2, p. 322. See also the regulations of 1743, *ibid.*, p. 325.

<sup>65</sup> Asseburg, *Denkwürdigkeiten* (1848), p. 76.

charges against the naval policy of the nations at war, more particularly against that of England.

The remonstrances of the Armed Neutrality of 1756 were presently reduced to insignificant proportions by the divergent interests of its two members. The league dissolved in 1757. In that year Sweden, influenced by French diplomacy, by her ambition for territory in Pomerania, and by her need to assuage domestic discontent, joined France in a war against Prussia. Denmark, interested mainly in plying her trade as the chief neutral carrier, and unwilling to impair the rich remuneration of commerce, refrained from adopting measures that might endanger her relations with England. War was foreign to her interest. In 1762, however, when the Crown of the Tsars was placed on the head of Peter III, who as Grand Duke of Holstein-Gottorp had claim to territory desired by Denmark, the Danish Government became greatly interested in the results of the battles of Frederick the Great and in the naval victories of England. The critical position in which Denmark then found herself required that she should retain the friendship alike of Frederick II and of George III.

Russia, destined to be a member of two later armed neutralities, became entangled in the Seven Years' War. Her regulations of May, 1757,<sup>66</sup> imposed the most severe restrictions upon neutral shipping. Her subsequent maritime policy is illuminating. During the War for American Independence Russia remained neutral, and Catherine II, in her famous Declaration of 1780,<sup>67</sup> promulgated the liberal principles in regard to neutral trade which were first enunciated by A. P. Bernstorff in 1778.<sup>68</sup> These principles, it is said, the Tsarina hoped to impose upon the belligerents while Russia herself remained neutral. In 1793, however, when that country was a participant in the war against France, she reverted to the severe restrictions of 1757.<sup>69</sup>

#### INFLUENCE OF ECONOMIC FACTORS, 1756-1780

Notwithstanding the unfavorable impression given by the controversies between neutrals and belligerents and by the negotiations for the Armed Neutrality of 1756, the Seven Years' War, like the other maritime wars of the eighteenth century, afforded the neutral merchants a welcome opportunity to better their economic position.<sup>70</sup> The naval wars diminished the

<sup>66</sup> Russia declared all Prussian ports blockaded, though the blockade was not made effective. Enemy property on board neutral ships was seized as good prize to the Russian captor. Boye, *op. cit.*, p. 109.

<sup>67</sup> For the Russian declaration of Feb. 28 (Mar. 10), 1780, see F. de Martens, *Recueil des traités conclus par la Russie avec les puissances étrangères*, IX, p. 307.

<sup>68</sup> Quoted by Holm in his "*Forhandlingene om en Vaebnet Neutralitet*," *loc. cit.*

<sup>69</sup> Cf. the Russian note to Sweden, July 30, 1793, in Annual Register 1793, p. 175, and the Anglo-Russian treaty of Mar. 25, 1793, in G. F. von Martens, *Recueil de principaux traités* (2d ed.), V.

<sup>70</sup> Cf. the report of the Danish councillor, Ryberg, for Oct. 30, 1770, in Nathanson, *Udførligere Oplysninger om Handel- og Finants-Vaesenet* (1802).

belligerents' tonnage and sent freight rates skyward.<sup>71</sup> Trade and shipping brought a steadily increasing stream of money into neutral countries, so that the condition of the average citizen was improved. With prosperity came the means, not only for a higher standard of living, but also for a greater degree of culture. The commonalty began to share in the intellectual movement of the time and to support governmental reforms.<sup>72</sup> Habitually neutral states began to look forward to new maritime wars, not with dismay and apprehension, but with hope and anticipation of the fruits of trade and shipping which they might then snatch from the hands of the otherwise occupied belligerent nations.<sup>73</sup>

The Peace of Paris of 1763 removed the stimulus which through seven years had animated neutral commerce. In the Northern countries there followed a period of economic stagnation. Where there had been feverish activity there was now idleness; where prosperity had prevailed there was now poverty. The depression continued for a dozen years. Then the outbreak of the War for American Independence brought new animation and new prosperity.<sup>74</sup>

For England the results of the Seven Years' War established her maritime supremacy and made her the greatest of all colonial Powers. It was generally recognized in the Scandinavian countries, and in France, Holland, and Germany, that the power of England rested on the broad foundation of her commerce. The governments of these nations sedulously planned to break the supremacy of her trade, particularly with the colonies and in the Baltic, and to seize a part of it for their own nationals whenever a favorable opportunity should arrive.<sup>75</sup>

An aggressive mercantilism was prevalent in Copenhagen and Stockholm, and under its influence there was developed a skillfully planned policy of industrial and commercial expansion. By means of currency reform, tariff and quota systems, the extension of credit and large loans free of interest to private concerns, the establishment of monopolies, and various forms of encouragement to the shipping industry, each government sought to prepare

<sup>71</sup> Amneus, *La ville de Kristiania* (1841), p. 70; Bugge *et al.*, *Den Norske Sjøfarts Historie* (1923), p. 528 ff.; Odhner, *Sveriges Politiska Historia* (1885), II, pp. 121-122.

<sup>72</sup> Friis *et al.*, *Det Danske Folks Historie* (1903-1919), VI, p. 9.

<sup>73</sup> Report of Ryberg for Oct. 3, 1779, *loc. cit.*

<sup>74</sup> Nathanson in his *History of Danish Commerce* portrays the general nature of the depression and continues: "We now leave this period. It clearly did not forbode better times. . . . Then the clouds rolled suddenly away, and Denmark's commercial sky became clear. . . . In the brilliant commercial period of 1775 to 1784 the country and its people gathered their activities to an admirable degree. The nation was thereby enabled to obtain for the future a not inconsiderable rank among the great seafaring powers."

<sup>75</sup> Cf. the instructions to the French representatives: Havrincourt at Stockholm, 1759, La Houze and De Verac at Copenhagen, 1769 and 1775 respectively, and Durand and De Juigné at St. Petersburg, 1772 and 1775 respectively, in *Recueil des instructions* (from 1648 to 1789), in Vols. 2 (Sweden), 9 (Russia), and 13 (Denmark).

its people for the opportunity of trade expansion which would come in the event of a renewal of the maritime war between France and England. In the calculations of Northern statesmen, therefore, the beginning of the conflict between England and her colonies in America was viewed with little dissatisfaction.<sup>76</sup> The maritime position of Denmark and Sweden would be improved; new markets would be available; trade routes closed to them in peace-time would be opened to their shipping. Renewed prosperity would follow the interbellum period of economic stagnation.<sup>77</sup>

It was common knowledge among the statesmen and rulers of Europe that neutral merchants engaged in war-time trade were inclined to transgress even the liberal bounds set by their own governments. The Dutch traders were severely arraigned on this score. They were always greedy for gain, according to Guldberg, the Danish Minister of State, and supplied France and Spain with all materials required for the equipment of their fleets. The censure of Catherine II was not less severe;<sup>78</sup> and Frederick the Great declared that the trade in contraband of war was too attractive for the merchants of Holland, who would not forego their particular gain for the common good.<sup>79</sup> These censures were equally applicable to the merchants of other nations, who, to judge from the correspondence of Bernstorff, were no more scrupulous than those of Amsterdam. The most careful regulations failed to prevent illegal trade.<sup>80</sup>

There were certain aspects of the War for American Independence which occasioned apprehension in the Northern capitals. A close scrutiny of the economic horizon disclosed the fact that Great Britain afforded the most extensive market for the products of the Baltic region and was the only country with which Denmark had a favorable balance of trade.<sup>81</sup> British commission houses and British shipping constituted the most convenient channels for Russian foreign commerce. The reduction of England would result in the destruction of this market. Her maintenance as a great Power was thus essential to the welfare of the Northern countries.

There was yet another angle from which to view the possible economic effect of the war in America. It was feared by the more far-seeing observers that the competition of the American colonies, if they should win their independence, would be more embarrassing to the commerce of the neutral states than was that of Great Britain. America, by reason of her location, her

<sup>76</sup> Report of Ryberg, Oct. 30, 1770, *loc. cit.*

<sup>77</sup> Letters of Bernstorff to Reventlou of Mar. 12 and July 13, 1776, in *Bernstorffske Papirer* (Friis, ed., 1904).

<sup>78</sup> Catherine to Grimm, Feb. 18, 1778, in Sbornik, *Lettres de Catherine II à Grimm* (1878).

<sup>79</sup> Frederick to Thulemeier, Oct. 14, 1776, in *Politische Correspondenz Friedrichs des Grossen* (1879—); see also letters 24,698, 25,086, 25,093 and others.

<sup>80</sup> Bernstorff to Reventlou, July 30, 1776, *loc. cit.*

<sup>81</sup> Bernstorff's Memorial to the King, March 17, 1780. See Holm, *Danmark-Norges Historie* (1906), V, part 1, Chap. 15.

incomparable resources, and the stimulus which independence would give to her citizens, would be in position to undersell the products of Denmark and Sweden, and to some extent those of Russia.<sup>82</sup> American grain, timber, and fish might even exclude similar European products from the world market. The products of her mines would have a ruinous effect upon the iron and steel industry of Sweden. "What future may this field of Swedish commerce expect," wrote Ehrensvärd, "in the event the English colonies in America win their independence, since these, under the shelter and with the stimulus of liberty, may carry similar undertakings to a height to which their country with its great advantages seems to entice them?"<sup>83</sup>

#### POLITICAL FACTORS

In the European diplomatic situation during the War for American Independence there was an element which impelled the Baltic states to refrain from any measure that would seriously endanger the position of England as a great European Power.<sup>84</sup> Fear of French domination set a line of demarcation beyond which aid given to France could not extend, and reduced the remonstrances of the neutral maritime Powers in the second half of the war to little more than mere demonstrations.

It was France and not England that since the advent of Richelieu had disturbed the composure of Europe. It was France that had intervened in the affairs of Germany and had aimed to profit by the weakness of the Empire.<sup>85</sup> Frederick the Great declared that it was the unchanging policy of France to "divide and rule" the Powers of Europe.<sup>86</sup> No responsible statesman of the period desired the reestablishment of France in the dominant position which she had occupied in the age of Louis XIV, and there was none in the North who did not wish to see retained a fair equilibrium among the Great Powers. It was clearly realized that the unimpaired strength of Great Britain was essential to the maintenance of the balance of power in Europe.<sup>87</sup>

Out of the diplomatic situation and the current economic system was evolved the foreign policy of the Baltic states during this period. That policy led to the temporary coöperation of Denmark, Sweden, and Russia. The immediate rivalry among these states, however, and the exigencies of the domestic political problems of each served to modify the broad outlines of their common purpose.

<sup>82</sup> Bernstorff's Memorial to the King, March 17, 1780. See Holm, *Denmark-Norges Historie* (1906), V, part 1, Chap. 15.

<sup>83</sup> Ehrensvärd, *Dagboksanteckningar föra ved Gustaf III:s Hof* (1878), II, p. 115.

<sup>84</sup> Guldberg's proposals for Denmark's foreign policy, Dec. 3, 1780, in Holm, *Dan.-Nor. Hist.*, V, part 1, Chap. 16.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Pol. Corr.*, letters 25,050, 25,069.

<sup>87</sup> In his proposals for the foreign policy of Denmark (see n. 83 *supra*) Guldberg commented: "It will ever remain a maxim that Denmark must desire to see the preservation of England as a great Power and that we can never wish for her downfall. The Bourbon Houses cannot establish their preponderance without disturbing the balance of power. No man can wish to see Louis XIV's flourishing period restored."

The policy of Russia toward the other Baltic states was conditioned by the results of the partition of Poland, the *coup d'état* in Sweden, and the Russian urge for territorial expansion in the South. From the Peace of Nystad in 1721 to the *coup d'état* of Gustavus III in 1772, Russia had joined with England at Stockholm and Copenhagen in an attempt to establish a "system of the North," in which one or if possible both of the Scandinavian states would form an alliance with the two greater Powers.<sup>88</sup> The aim of this policy was to create a balance against the French system of family alliances, and as far as Russia herself was concerned to prevent Sweden, the natural ally of Turkey and Poland, from attacking her on the North while her armies were concentrated elsewhere.

With the events of 1772 two of the chief reasons for Russo-English harmony in the Baltic disappeared. The partition of Poland by lowering French prestige on the Continent removed the danger of the French system of alliances; the *coup d'état* at Stockholm eliminated foreign intervention in Swedish affairs and thereby destroyed Russian and English influence in Swedish party politics. England thereafter adopted a policy of non-interference in Sweden, and her coöperation with Russia ceased to be one of the major factors in the diplomacy of Northern Europe.<sup>89</sup>

The partition of Poland resulted also in a gradual estrangement between Russia and Prussia, although their treaty of alliance did not lapse until the death of Panin in 1780. By that time there had occurred a new orientation in Russian policy. During the War of the Bavarian Succession common diplomatic efforts had been made by Russia and France to preserve peace in Germany. French statesmen had earlier signified their willingness to abandon Poland in return for a commercial treaty with Russia and a share in the Russian foreign trade, until then monopolized by England.<sup>90</sup> By 1780, however, Russia was making common cause with Austria, and with Austrian support was designing the reestablishment of the Greek Empire, possibly under the rule of a Russian prince.<sup>91</sup> To achieve this end she found it desirable to eliminate intervention on the part of the neighboring states in case war should break out with Turkey. In view of this interest it was determined that Swedish armies, backed by French gold, should not inconvenience Russia on the northern frontier. That fact largely explains the interest of Catherine II in the proposal made by A. P. Bernstorff in 1778 to establish a league of armed neutrals. By the requirements of such a league Swedish attention to the affairs of Russia would be dissipated.

<sup>88</sup> Chance, British Diplomatic Instructions, III (Denmark), and V (Sweden), *passim*.

<sup>89</sup> *Ibid.*, V, for the letters of Suffolk to Goodricke, representative at Stockholm, of May 22, 29, June 16, 24, Aug. 4, 18, 21, Sept. 1, 8, Nov. 17, 1772, and those to De Visme at that place, of Nov. 11, 1774. Cf. Ehrensvärd, *op. cit.*, I, p. 149.

<sup>90</sup> Instructions to De Juigné of May and September, 1775, in *Recueil des instructions*, Vol. 9 (Russia). Cf. Catherine's letter to Grimm of Aug. 16, 1775, *loc. cit.*

<sup>91</sup> Jauffret, *Catherine II, son règne* (1860), I, p. 203 ff.

In Sweden the embarrassment of local conditions was of great significance. On August 19, 1772, Gustavus III effected a revolution which terminated the rule of the Estates and the so-called "age of freedom." The tradition of parliamentary government, however, was not destroyed. The nobles could not forget their former influence and resented the usurpation of power by the young monarch.<sup>92</sup> Their bitter opposition to the King had great weight in the shaping of Sweden's foreign policy. Discontent obtained in the Council and in the army, in the press and among the deposed aristocracy, who entertained plans for regaining their power.<sup>93</sup>

The King was ill-equipped to win the confidence of the upper classes. Self-willed, uncompromising, and bent on going his own way without counting the cost, he learned early to dissemble his purposes. While these traits were raising a barrier between him and his older friends, he was surrounding himself with pedants and courtiers for companions. He was of a dramatic turn of mind, and lived in the imaginary life of the stage, whose heroes and fictitious situations he often comfounded with the world he aimed to govern by statecraft. He envisaged Sweden elevated to the rank of a Great Power and himself occupying the center of the scene, admired and envied by men of affairs and by the Paris salon. This vision he labored to make actual.<sup>94</sup>

Of the many states that were interested in the establishment of a centralized and more efficient government at Stockholm, Gustavus believed that Russia alone was bent upon intervention.<sup>95</sup> In order to avert such interference it became the chief aim of the King's foreign policy to win the Tsarina's approval and recognition of the new government.<sup>96</sup> To this end the negotiations for the establishment of an armed neutrality provided a favorable opportunity.

Two other forces, each born in him, as it were, and fostered by his training and early environment, combined to mold the foreign policy of Gustavus III. The one was his attachment to France, the other his hatred of Denmark.<sup>97</sup> More than a century of close political and cultural association had prepared Sweden to become a faithful client of France when the events of 1772 at home and in Poland made coöperation between them imperative. The generations-long rivalry between Sweden and Denmark was accentuated by the King's usurpation of the Swedish Government.

<sup>92</sup> Schinkel, *Minnen ur Sveriges Nya Historia* (1885), I, p. 374.

<sup>93</sup> *Ibid.* Cf. Ehrensvärd, *op. cit.*, II p. 31.

<sup>94</sup> In Heidenstam's *La fin d'une Dynastie*, Erdman's *Gustaf III, Det förste Bladene i hans Historie*, Schuck's *Gustaf III, en Karakterstudie*, and Wahlström's *Gustavianske Studier* are found a portrayal of the King's character and purposes.

<sup>95</sup> Cf. Stavenow, *Den Gustavianske Tiden* (1925), p. 9; Gefroy, *Gustav III et la cour de France* (1867), I, p. 186; Instructions to D'Usson, September, 1774, in *Recueil des instructions*, Vol. II (Sweden).

<sup>96</sup> Catherine to Grimm, July 14, 1774, *loc. cit.* Cf. Bain, *Gustavus III* (1894), I, p. 205.

<sup>97</sup> Wahlström, *op. cit.*, p. 122 ff.; Schuck, *op. cit.*, p. 120; Heidenstam, *op. cit.*, p. 98.

While the change in government bound Sweden more closely to France, it nearly involved her in a war with Denmark. The latter had long had reason to fear an attack on Norway whenever Sweden should be arbitrarily governed by a strong and ambitious monarch. Both countries armed for war; Denmark looked to Russia for support, while Sweden appealed to France. Versailles sent Durand to St. Petersburg to dissuade Russia from aiding her ally, and applied diplomatic pressure at Copenhagen to induce Denmark to refrain from military measures and form an alliance with Sweden. In 1778 and 1779, when there was concerted diplomatic action between France and Russia, the tension between Denmark and Sweden was eased and temporary coöperation again became possible.<sup>98</sup>

The ambition of Gustavus III was not circumscribed by the relatively limited aim of acquiring Norway. His territorial aspirations extended to the other side of the Atlantic, where he apparently hoped to establish a Swedish colony at the expense of Great Britain. To this end he proffered the services of a Swedish fleet to the Americans, and his own services as mediator in the forthcoming peace conference. He negotiated with France, sent a personal letter to George III, and requested the assistance of the Tsarina in his vain efforts to make his mediation acceptable.<sup>99</sup>

There was yet another strongly influential factor in the foreign policy of Gustavus III, the need of assuaging the domestic unrest. Depression in the iron industry, burdensome taxes, deficits, and governmental supervision over the nation's economic life engendered discontent. The King became apprehensive and sought to dissipate the impending domestic storms by engaging the national energy in problems of foreign affairs.<sup>100</sup>

The Danish situation was similar to that of Sweden. The Palace Revolution of 1772, which forced the banishment of the Queen, a sister of George III, served to estrange Denmark from England and to heighten her association with Russia, while at the same time it gave rise to opposing factions in the Danish Government. There was subsequent friction in the Council; divergent views were held by leaders like Bernstorff and Guldberg, and discontent was rife among the various classes of the population. These purely domestic problems tended to influence Danish foreign policy.

As to the acquisition of territory, the ambition of Denmark was modest. Guldberg in 1780, as J. H. E. Bernstorff in an earlier day, regarded the securing

<sup>98</sup> For Dano-Swedish relations see Holm, *Dan.-Nor. Hist.*, V, part 1, Chaps. 3, 4, 8, 13.

<sup>99</sup> Cf. Schinkel, *op. cit.*, II, p. 198 ff.; Ehrensward, *op. cit.*, II, p. 115 ff.; Heidenstam, *op. cit.*, p. 140.

<sup>100</sup> The influence of the domestic situation upon the foreign policy did not escape the notice of contemporaries. Von Schinkel observes (*op. cit.*, p. 270): "In domestic matters events occurred in the course of 1779 which instilled in the King apprehension of the future and impressed upon him the need . . . of engaging the national interest in foreign problems." For the anticipated effect of the armed neutrality see the letter of Jan. 1, 1781, by the Duchess of Sudermania to the Countess Piper, quoted in Heidenstam, *op. cit.*, p. 140.

of a small island in the West Indies<sup>101</sup> on which to plant sugar cane as a matter of importance to the welfare of the nation and worthy of great attention. It was believed that in return for coöperation in the formation of an armed neutrality Denmark might expect Russian aid to acquire this island. Russia would secure her *code maritime*, Denmark a new colonial possession.

Into the foreign policy of the Baltic states, built upon such a foundation, there was thrust anew the complicating force of French diplomacy. In March, 1778, France was at war with England. At the very beginning of hostilities she requested Sweden to create a neutral league as had been done in 1691, 1693, and 1756.<sup>102</sup> In strange contrast to this appeal she issued on June 24 an ordinance renewing the rigid regulations of 1681 and 1704, which provided that neutral ships carrying enemy goods should be good prize together with their cargoes, and this notwithstanding her treaty stipulations containing the opposite principle.<sup>103</sup> The pursuance of an illiberal policy of this nature was, however, contrary to the interest of France. Through the services of neutral shipping alone could she hope to secure the importation of those commodities which she required in waging the war, if the British fleet should again sweep her own from the sea. Her policy, then, was perforce to encourage neutral shipping and to proclaim the inviolability of neutral rights.

The declaration which was issued on July 26<sup>104</sup> was an essential preliminary to the execution of such a program, and it would seem that the ordinance of June was intended to increase the effect of that of July. The latter proclaimed that France would honor for a period of six months her treaty stipulations that free ships should make free goods. At the end of that time she would revert to the June regulation, unless the neutrals could induce England to adopt the same principle.

The French ordinance of July prompted the Northern states to endeavor to force England in her relations with them to abandon her treaty rights and accept the principle of "free ships, free goods." "If the Danish Government yield on this point," declared Bernstorff, "France will undoubtedly place herself in the same relation to Denmark as England is, notwithstanding that in her treaties with Denmark she has accepted this principle."<sup>105</sup> Bernstorff's instructions to the Danish Minister at Stockholm, directing him to approach the Swedish Government, give further illustration of the influence of the policy of France.

The French Government persisted in reminding Stockholm of the advisability of concerted action by the neutral Powers against Great Britain. Gustavus III and his Minister, Scheffer, were strongly inclined to listen to

<sup>101</sup> Krabben Eyland. Holm comments (*Dan.-Nor. Hist.*, V, p. 349): "The thought of achieving this object held Guldberg at this time in a remarkable passion."

<sup>102</sup> Odhner, *op. cit.*, I, p. 535.

<sup>103</sup> Lebeau, *Nouveau code des prises* (1799-1801), II, p. 299.

<sup>104</sup> *Ibid.*, p. 339.

<sup>105</sup> Holm, "*Forhandlingerne om en Vaebnet Neutralitet*," *loc. cit.*

these propositions, for they were on the point of engaging in negotiations for a new subsidy treaty with France. These negotiations could not be postponed unless Sweden was prepared to forego her subsidies the following year. That would be a sacrifice which the country was not prepared to make, particularly since inimical remonstrances against England would not be hazardous.

#### BERNSTORFF'S NOTE OF SEPTEMBER, 1778

Such was the posture of affairs when American privateers interfered with and threatened to disrupt Russian trade from Archangel, which was at that time controlled by foreign merchants, chiefly British. Catherine II, who seems to have regarded the Americans and their cause with indifference,<sup>106</sup> decided to adopt a policy that would terminate these depredations on Russian commerce. She turned for assistance to her ally. In a note of August 25, 1778, she summoned Denmark to unite her maritime forces with those of Russia for the protection of their commerce in their adjoining territorial waters in the Arctic. It was suggested that Denmark should indicate the means which she considered most effective for the attainment of this object.<sup>107</sup>

The protection of merchantmen in the Arctic was of no consequence to Denmark, whose trade was concentrated in the capital and a few of the towns of southern Norway. Moreover, the Russian proposal seemed designed primarily for the protection of British shipping, a reduction of which would be to the advantage of the neutral merchants. Since Bernstorff was eager for joint action with Russia, however, his task became that of inducing the Tsarina to accept a program more comprehensive in scope and more advantageous to the neutral trader than that which she had herself outlined. This he essayed to accomplish in his note of September 28, 1778.<sup>108</sup>

The plan of Bernstorff was significant, not only in that it sought to extend the sphere of common action, but also in that its propositions, based on issues involved in previous controversies between neutrals and belligerents, were later adopted as the program of the Armed Neutrality of 1780. The language of the five points of the Declaration of the Tsarina of Russia regarding the principles of armed neutrality, which she addressed to the Courts of London, Versailles, and Madrid on February 28 (O. S.), was virtually identical with that of Bernstorff's note.

The exchange of notes between Russia and Denmark initiated negotiations which, after being continued for a period of two years, resulted in the establishment of the Armed Neutrality of 1780. The history of the last phase of these negotiations has been frequently related in all the principal languages of modern Europe, and has become generally familiar to students of maritime law and of eighteenth century diplomatic history. The program, with its

<sup>106</sup> Cf. her letters to Grimm, Feb. 2, Mar. 4, 1778, and July 24, 1780, *loc. cit.*

<sup>107</sup> Holm, *op. cit.*

<sup>108</sup> *Ibid.*

five propositions, which the league adopted, more clearly drawn up than those of earlier associations of neutral states, is equally familiar.

The history of the Armed Neutrality of 1780<sup>109</sup> is much like that of the earlier leagues. The principles which it enunciated as governing the relationship of neutrals and belligerents were abandoned by every one of its members upon becoming involved in war. Although it singled out the chief points of dispute which disturbed that relationship, none of the reforms which it advocated were destined to be effected in the eighteenth century.

<sup>109</sup> See *The Armed Neutralities of 1780 and 1800*. A collection of official documents, preceded by the views of representative publicists. Edited by James Brown Scott, Director, Division of International Law, Carnegie Endowment for International Peace. New York: Oxford University Press, 1918.

## DISCOVERY, SYMBOLIC ANNEXATION AND VIRTUAL EFFECTIVENESS IN INTERNATIONAL LAW

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There are some problems of international law which at times are felt to be in the air. Today without doubt one of these questions is that of original acquisition of territorial sovereignty. Arbitration cases such as those concerning the Island of Palmas and Greenland started a heated discussion of the principles involved in the field of scientific research.<sup>1</sup> In a short period of five years a series of treatises on this problem have been published, several of which are valuable contributions to the theory of international law. We may refer, for instance, to Goebel, *The struggle for the Falkland Islands* (1927), Fuglsang, *Der Streit um die Insel Palmas* (1931), Smedal, *De l'acquisition de souveraineté sur les territoires polaires* (1932), Bleiber, *Die Entdeckung als Rechtstitel für den Gebietserwerb* (1933). As it is hardly feasible within a short space to exhaust all the considerations which such a problem presents, our task is not to compete with these theorists, but only to supplement their work in some way by a few suggestions, which may serve to contribute towards a constructive effort to form a new theory by means of observation and deduction from significant political facts in the past.

### I. THE PRE-CLASSIC PERIOD 1300-1450

(a) *The rôle of effectiveness in feudal conceptions.* As regards the period before the 15th century, Bleiber contends that at this stage of history only one sovereign title to newly acquired territories was recognized, viz., papal donation. He overlooks, as do most modern writers, the great importance which was assigned at that time to effective occupation. We may refer to || the fact that in the feudal system the acquisition of a certain territory presupposed the possibility of maintaining it effectively. Under feudal laws, a certain territory was acquired only by the fact that its inhabitants swore allegiance, as *homines ligii*, to their future lord. And allegiance presupposed an effective rule over the territory in question, both within and without. As in all feudal relationships, allegiance worked both ways, binding the lord as well as the liegeman; the latter was obliged to obey the lord, the former to

<sup>1</sup> Furthermore, the question of original acquisition of territorial sovereignty plays a large part in the actual quarrel between Paraguay and Bolivia concerning sovereignty in the Gran Chaco territory. The contradiction between both the theory of the *uti possidetis de jure* and that of the *uti possidetis de facto* which is at the bottom of this conflict, may be indeed regarded as being in its last theoretic fundamentals based on the old controversy between opinions which admit both symbolic annexation and mere virtual effectiveness to be, at least in certain cases, a sufficient sovereign title, and views which recognize effective occupation in the strictest sense to be in every case the only sufficient title to territorial sovereignty.

protect his vassals. The prince who was unable to afford such protection to his own *homo ligius*, that is to say, who was unable to maintain his territory against foreign intruders and to prevent interference of a third power, and was incapable of ensuring peace and order within its boundaries, either never really acquired, or forfeited, his claim to the liegeman's obedience, *i.e.*, the title over the territory in question.

The same idea is pointed out by Kiefé when he says:

Allegiance can only result from an actual and not merely a theoretic obligation of obedience to the sovereign. . . . But . . . since it was the protection which the king accorded to his subjects that involved the obligation of allegiance which the subject owes to the king, it is evident that this allegiance cannot exist unless the king is able to protect in an effective manner all those born within the territory on which he claims the right to impose his laws . . . <sup>2-3</sup>

(b) *Prescription in medieval international relations.* In this connection we may refer to the important rôle which prescription played in medieval political thought and life. It was on the ground of prescription, *i.e.*, because of the non-exercise of a positive rule and legal authority which signifies much more than the bare *jus alios excludendi* and which constitutes an essential element of sovereignty, that the French and English claims to be independent of the Holy Roman Empire were based. That is laid down not only in the treatises of French, German and Papal theorists, but also in the political declarations of kings and statesmen. From a hundred examples we can mention Konrad of Megenberg's work *De translacione imperii*, which deals largely with the question, or the remarks of Bartolus of Sassoferrato in his *Commentaries in Infortiatum*: "You may observe that the Roman Emperor is the lord paramount of the world. . . . This I think is true except in the case when prescription has been ruling for some considerable time . . ." <sup>4</sup>

The same thought is to be found in the Sicilian King Robert's instruction

<sup>2</sup> Kiefé, "L'allégeance," in *La Nationalité*, edited by the *Institut de Droit Comparé de l'Université de Paris*, 1933, p. 57.

<sup>3</sup> Cf. Aegidius Colonna, *Tractatus quomodo reges et principes possunt possessiones et bona regni pecuniaria ecclesiis elargiri*, *Opera*, Vol. I (1555), fol. 37: "Goods which are within the kingdom are incapable of being so much removed from the king's power that this power does not owe them protection and the goods do not owe obedience to the king's power in the case of need . . . , because the community of a kingdom exists for the sake of protection and defence. . . . If something within the kingdom ceases to be under the king's actual protection, there is nothing to be said other than that the object in question ceases to be within the kingdom and to take part in the community of the same. . . . But as long as the goods are under the actual protection of the kingdom, they must not be considered as separated from it." Cf. also William Occam, *Dialogus*, III, 2, 2, 5, in Goldast, *Monarchia Sacri Romani Imperii*, Vol. II (1613), p. 905: "The lord is bound by the same loyalty to his subject as the subject is to the lord: And if he does not display it, he is deprived of his lordship which he previously had over the subject." More examples of this are easily to be found.

<sup>4</sup> Bartolus, *Comm. in Infort.*, I, D. 27, 1, 6, in Woolf, *Bartolus of Sassoferrato* (1913), p. 109.

to his ambassadors at the Holy See, of August, 1312: "The Emperor may assert that they (*viz.*, the Sicilians) are his subjects . . . according to the sequence of the above-mentioned scriptures . . . ; but scripture has no force against a custom both contradictory and continued."<sup>5</sup>

It was prescription again—positive rule and legal authority not being exercised—that involved the loss of the Imperial territory in the south of France during the 13th and 14th centuries. As an example, a letter, dated September 15, 1281, of the prince-electors Joan of Saxony may be quoted. The letter by which he agrees to the *enfeoffment* of Charles Martell of Anjou in the reign of Vienne runs:

In view of the fact that we were informed by certain sure intelligence, the truth of which can be attested, that the kingdom of Vienne . . . which once was ruled over by the Emperor . . . is disintegrated by a long, exceedingly long gap of 200 years and more, so that not even the memory of such rights, and of the boundaries of that kingdom, exists at all . . .<sup>6</sup>

(c) *Effective occupation alone as sufficient title.* Effective rule over territory was at least in the pre-classic period, an essential requirement for the acquisition and maintenance of territorial sovereignty. At the same time this effective rule alone was considered to be sufficient to establish territorial sovereignty. Bartolus may be quoted again when he says in his *Commentaries In Codicem*, after having enumerated several ways and means of acquiring the sovereign title to territory: "Yet, if a city makes it evident that it has *exercised* sovereign power, then this is valid."<sup>7</sup>

In the same way Bartolus deals with the question in his famous treatise *De Insulis*, where we read:

Whatever is occupied belongs to the occupant. . . . After someone has gone with an army to occupy a certain territory, another is not allowed to go there legally: For the right of acquiring that region had already been acquired by him who went. . . . But what is the law in the case of some lord not going with an army, but making a raid or incursion in that land? In this case do the rights seem to be likewise acquired beforehand? I answer: No. . . . It cannot be said that an enterprise has been achieved, and rights have been acquired because of one single raid or incursion. This result obtains only if the lord in question has started out with an army capable of acquiring the land according to the requirements of the case. . . . Then we have to deal with the hypothesis . . . that some lord paramount grants that right of occupation *re integra* to some liegeman. This has been performed several times by the Pope. But what is the law if he to whom the right is awarded neglects to occupy? The question is whether he loses that right? I answer:

<sup>5</sup> Bonaini, *Acta Henrici VII* (1877), Vol. I, p. 205.

<sup>6</sup> *Sitzungsberichte der k. u. k. Akademie der Wissenschaften* (1877), Vol. 88, p. 663. Cf. also John Faber: "The Emperor is not made a ruler outside the boundaries within which he is actually obeyed . . . and just as little is another king or lord."

<sup>7</sup> Bartolus, *Comm. in Cod.*, I, C. 2, 3, 28; in Woolf, *op. cit.*, p. 135. Cf. also Albericus de Rosciate, *Comment. in primam partem Codicis* (1586), p. 7.

Yes; he loses his right of occupation if he defers it without due reason. It would indeed be the same, if he went with an army . . . and then removes the same. He would lose that right.<sup>8</sup>

These deductions comprise the legal maxims of the time of Bartolus which appear in a hundred contemporary political documents and pronouncements. It is not the object of this article to give a complete survey of the medieval theory of territorial sovereignty. The few examples already quoted will suffice. A more detailed exposition of the medieval conceptions in the field of international law will be the aim of a later work.

(d) *The so-called Papal donations.* The quotations out of Bartolus' treatise *De Insulis* have already mentioned the so-called Papal donations. The term "donation" is misleading. As Bartolus pointed out, the Papal bulls did not bestow territories on princes; they only legalized, recognized, sanctioned *ex post facto* territorial sovereignty which already existed in fact, or they gave assent, and thereby legal sanction *ex ante* to an intended occupancy, to a condition anticipated in the future. They granted then, so to speak, an inchoate title, the *jus ad occupationem*. In both cases—to use an analogy of Roman private law already familiar to some medieval theorists—the purpose of the Papal donation was to convert the *possessio* of land, acquired, or to be acquired in future, into *justum dominium*; and in both cases the Papal donation could not replace the *possessio* or render it superfluous. The very text of the various Papal bulls themselves makes this rather evident. To begin with the *Laudabiliter* of Hadrian IV, on which England based her claims to Ireland, or with the famous bull of Alexander III to the King of Portugal, dated May 21, 1179, where we read: "All the regions which you will have rescued from the hands of the Saracens, and where other neighboring Christian princes could not acquire any legal rights, are conceded by us to your Excellency,"<sup>9</sup> till the bull *Romanus Pontifex* of Nicholas V, issued on January 8, 1455, by which the rule over the lands "already acquired, or to be acquired in future" was granted to Portugal "after they have been actually acquired,"<sup>10</sup> or the *Ea quae* of 1506 which confirmed the partition of the colonies between Spain and Portugal established by the Treaty of Tordesillas, and speaks definitely of "discovered and occupied islands."<sup>11</sup>

Finally Fuglsang proves from the text of the *Inter caetera* of Alexander VI, dated May 4, 1493, that the aim of the so-called Papal donations was in fact the conversion to Christianity of the inhabitants of territories which were bestowed on the King of Spain and of Portugal, and points out that "at this time a conversion of heathens to the Christian faith seemed highly improbable without effective possession and dominion over the territory in question. The Pope awarded his donations only in order to further the conversion of

<sup>8</sup> Bartolus, *Consilia, Quaestiones et Tractatus* (1547), p. 137.

<sup>9</sup> Migne, *Patrologia latina*, Vol. CC (1855), p. 1237.

<sup>10</sup> Meinardi, *Bullarum ampl. collectio*, Vol. III (1743), p. 70ff.

<sup>11</sup> da Silva, *Corpo Diplomatico Portuguez*, Vol. I, p. 91.

the inhabitants of the discovered territories by means of occupation by Spain and Portugal; he was interested, therefore, in discoveries only as far as they led to a thorough occupation."<sup>12</sup>

The medieval jurists understood the significance of the Papal bulls in precisely the same manner as we have shown above. Bartolus has been quoted previously; in another treatise, in his *Commentaries In digestum vetus*, he says: "The Pope and the Emperor can concede to our Kings realms which they are holding against Saracens, and which already have belonged to us."<sup>13</sup>

## II. THE CLASSIC PERIOD OF DISCOVERY 1450-1550

(a) *General remarks.* The discoveries of the great explorers during the 15th and 16th centuries started the question whether the appropriation of newly found regions by means of land-marks and symbolic acts could replace effective occupation. It does not seem in point to speak here of a tendency to recognize "discovery" as a possessory title. At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation. Like the so-called Papal donations, discovery also seemed to confer only the *jus ad rem*. No convincing evidence can be put forward that discovery at any time has been deemed sufficient to establish the slightest *jus in re*. Whenever statesmen deduced sovereign rights from the bare fact of discovery, it was not because they were convinced of the correctness of their argumentation, but because they had no better arguments to support their political claims. The same State which based its own claims on discovery, refused to recognize discovery as conferring sovereign title whenever its rivals were concerned.

1) A distinction must be made between mere discovery and the legal act of appropriation by means of land-marks and symbols. This difference is better felt than perceived by the theorists and statesmen of the 16th and 17th centuries when they tried to discriminate between "discovering" and "finding." That distinction already appears in Charles V's famous instruction to his ambassador Juan de Zuniga of December 18, 1523, where the Emperor points out "that, although Mallucco had been discovered by ships of the King of Portugal . . . , it could not, on this account, . . . be said that Mallucco had been found by him . . . ; for it was evident that to 'find' required possession, and that which was not taken or possessed could not be said to be found, although seen or discovered."<sup>14</sup> The same distinction, which rests upon the fact that *detegere* in Latin means "to discover casually," while *invenire* presupposes a conscious, intended activity in order to find the thing in question, recurs in numerous governmental pronouncements and theoretical treatises, those of Gryphiander and Grotius included. Statesmen

<sup>12</sup> Fuglsang, *Der Streit um die Insel Palmas* (1931), p. 83.

<sup>13</sup> Bartolus, *Comm. in Dig. Vet.*, II, D. 19, 1, 57, in Woolf, *op. cit.*, p. 73.

<sup>14</sup> Goebel, *The struggle for the Falkland Islands* (1927), p. 96.

and theorists even of the classic period of discovery seem to agree that, to be acquired, a territory must be "taken or possessed." But the question arose, when could a newly found region be considered as being "taken or possessed," i.e., whether possession presupposes effective occupation or only a symbolic act of appropriation. The problem we have to deal with, which engaged the theory of international law for nearly five hundred years without being solved, cannot be characterized by the opposition of the two notions of "discovery" and "possession" under such a general conception as "acquisition of sovereign rights," but by opposition of "symbolic annexation," on the one hand, and "effective occupation" on the other, under the general title "possession."

(b) *Documents mentioning symbolic annexation, and their respective theoretical value.* There is no doubt that since the end of the 15th century the official acts and practices of governments show a growing inclination to recognize symbolic act of annexation of a newly found country as a possessory title. Henry the Seafarer, who died in 1460, ordered that crosses and marks be erected as a sign of Portuguese dominion in regions discovered by his fleet.<sup>15</sup> Many of the instructions and charters by which the various governments authorized adventurers, scientists, speculators and scholars to make discoveries contain a similar order. In his *Treatise on International Law* <sup>16</sup> Hyde quotes the charter which on March 5, 1496, Henry VII of England issued to Cabot, by which John Cabot and his sons were authorized not only "to seek out, discover, and find whatsoever islands, countries, regions or provinces of the heathens and infidels, whatsoever they be, and in what part of the world soever they be, which before this time have been unknown to all Christians," but also "to set up our banners and ensigns in every village, town, castle, island or mainland, of them newly found," and to "subdue, occupy and possess" the same "as our vassals and lieutenants, getting unto us the rule, title and jurisdiction of the same."

Another similar charter which Goebel has quoted belongs to the same period, viz., the patent given to Alonzo de Hoyeda by Ferdinand the Catholic of Spain on June 8, 1501.<sup>17</sup> It contains the following instruction:

That you go and follow that coast which you have discovered which extends east and west as it appears, because it goes towards that part where it has been reported that the English are making discoveries, and that you set up marks with the arms of their Majesties or with other signs that may be understood, such as may seem fitting to you, so that it may be known that you have discovered that land, in order that you may stop discoveries of the English in that direction.

As Goebel points out when he quotes the instruction to Hoyeda, according to the text such directions to erect signs are not a conclusive argument that

<sup>15</sup> Tilby, *The American Colonies, 1583-1763* (1911), p. 15.

<sup>16</sup> Hyde, *Treatise on International Law* (1922), Vol. I, p. 163.

<sup>17</sup> Goebel, *op. cit.*, p. 91.

such symbolic acts were considered as a substitute for effective possession, bestowing the full possessory title. They may be interpreted also as a device to show to the world that an inchoate title to the discovered region was acquired which rendered it *terra prohibita* as far as other States were concerned, but which did not yet grant full control or discretion in regard to the territory to the State whose signs were erected. The inchoate title finally perishes unless it is followed and perfected by effective possession in a reasonable time. If one considers the fact to which Fuglsang<sup>18</sup> refers, that in most cases the discoverers of the New World left garrisons on the newly-found coast and forced their way into the interior of the country in order to subdue it effectively, the interpretation mentioned becomes highly probable.

(c) *Documents mentioning effective occupation, and their respective theoretical value.* Besides the charters which deal with symbolic appropriation, others exist which speak of effective and actual occupation. Goebel, Fuglsang and Bleiber quote a series of instructions of this kind out of which we may analyze only some few of historical importance.

The first instruction, for instance, which the Spanish monarchs Ferdinand the Catholic and Isabella issued in 1492 to Columbus speaks, according to Goebel,<sup>19</sup> of the discovery and acquisition (*ganar*) of new islands and mainlands, and also of their conquest (*conquer*). The second patent to Columbus of May 23, 1493, "speaks of the purpose of mastering and holding (*senorear y poseer*) the islands and *terra firma* already taken possession of"<sup>20</sup> by the solemn symbolic act described by Columbus in his journal on October 12, 1492,<sup>21</sup> in the name of the Spanish monarchs. In all these charters and patents no evidence can be found that, to acquire a region newly discovered, the symbolic act of planting crosses and marks, as performed by Columbus on his first voyage, was considered to be a sufficient title. The quoted text of the second patent, which we may fairly interpret as an order to complete the inchoate title acquired by symbolic annexation, seems to express rather a contrary condition of what is required by law.

The same may be said of the "Charter of the Academy" of King Henry IV of France, to which Bleiber<sup>22</sup> refers in order to demonstrate the truth of his statement that the acquisition of newly-found countries by means of marks and symbolic acts was at one time considered as a full possessory title. According to Bleiber, the king gave instruction "to make discoveries and to exercise the royal power over the regions between 40° and 46°"—a formula which seems to indicate that the effective and actual exercise of a ruling authority, *i.e.*, effective possession, was intended.

While the instructions issued to Cabot in 1496 speak of symbolic annexation as well as of conquest and occupancy, the succeeding English charters aim first of all at the colonization of newly-found lands. By his patent of

<sup>18</sup> Fuglsang, *op. cit.*, p. 81.

<sup>19</sup> Goebel, *op. cit.*, p. 88.

<sup>20</sup> *Ibid.*, p. 90.

<sup>21</sup> Hyde, *op. cit.*, p. 163.

<sup>22</sup> Bleiber, *Entdeckung als Rechtstitel für den Gebietserwerb* (1933), p. 68.

December 9, 1502, for instance, which was intended to make clear the way for the first unsuccessful English attempt to gain a footing in territories overseas, Henry VII of England permitted "men and women from England to settle therein and to improve the same under the direction of these grantees whom we hereby empower to make laws."<sup>23</sup> Repeating the wording of a patent given by Queen Elizabeth of England to Sir Humphrey Gilbert (June 11, 1578), the famous charter to Sir Walter Raleigh of March 24, 1584, which formed one of the legal foundations of all later English colonial rights in America, authorized Raleigh "to discover barbarous countries not actually possessed of any Christian prince . . . to occupy . . . the same for ever," and to found colonies there subject to English laws.<sup>24</sup>

It is true that, logically, the existence of charters and instructions speaking of occupancy and colonization cannot be alleged as a conclusive argument for the proposition that effective possession has been deemed necessary to the sovereign title to a newly found region. Even if a government starts from the assumption that the bare symbolic act of planting crosses and landmarks gives it a full and sufficient possessory title to territory, other political reasons // may cause it to order effective occupation. Nevertheless, the fact that so many charters appear to speak of effective possession seems to weaken the arguments of those who, from the order repeated in dozens of different charters to erect marks and signs in newly found regions, infer a rule of international law that these symbolic acts bestowed at that time full rights of sovereignty.

Most of the Papal bulls, as well as a series of charters issued to explorers by Spain and Portugal, England and France, contain a clause which the English patent of 1502 worded as follows:

Provided always that in no manner shall they enter upon or hinder those countries, nations, regions or provinces, heathen or infidel, which have previously been found by the subjects of our most dear brother and cousin the King of Portugal, or any other prince, friend, or neighbor of ourselves, and which already are in the possession of the said princes.

A great number of patents provided further that in the land settled by the grantees the right was conferred upon them to oust all intruders. Referring to such stipulations in the English charter of 1502, Goebel<sup>25</sup> notes that the form of these patents "is exceedingly interesting" not only "because the navigators were warned away from lands discovered and already in the possession of other princes," while they were allowed to enter every country not yet possessed, but also because the provision to oust intruders "is a most cogent proof" that the kings who issued those patents recognized effective occupation, sufficient to restrain intruders, as the only true source of right. From both of these facts, according to Goebel, "it seems fair to assume" that the said sovereigns "regarded the claims of the Spanish and Portuguese to

<sup>23</sup> Tilby, *op. cit.*, p. 27.

<sup>24</sup> Tilby, *op. cit.*, p. 52.

<sup>25</sup> Goebel, *op. cit.*, p. 58.

certain exclusive rights in the new continent as defensible only in so far as these claims were supported by actual possession." We deem only the second of Goebel's conclusions to be a fair and convincing interpretation. As to the first, we refer to our introductory remarks where we argued that possession does not mean always or of necessity actual and effective occupation.

We do not venture indeed to draw any final conclusions from these few spectacular cases which were sufficiently notorious to get into nearly every book on the subject and to be repeated by a dozen modern writers. Five or ten facts or documents scarcely give us even a rough idea of what the practice of nations for a whole century tended to recognize as legally binding. By their similarity they may be suggested as proving a tendency in international practice, but no more. A few prominent cases are not sufficient to prove that a rule of international law existed at a certain time and was actually binding on States. A thorough and exhaustive examination of the practice of nations at the time in question is indispensable. Such an examination being beyond our purpose, we prefer to restrict ourselves to establishing the fact that Goebel's work is practically the only one to which Adair's comment on Nys<sup>26</sup> can be applied, that it is the "one outstanding example of an attempt to combine the legal and the historical points of view." Neither of Bleiber nor of Fuglsang can the same be said; and, unless based on such a minute examination, the assertion that, at some time, discovery and symbolic annexation were considered to be a full and sufficient title, is as unsound as the contrary statement that at this period of the law of discovery, fictitious occupation gave an inchoate title.

(d) *Documents of ambiguous meaning.* Moreover, in most cases where they are quoted, these five or ten outstanding facts and famous documents are rather ambiguous. This ambiguity, for instance, appears in the case of the diplomatic instructions which the kings of Spain issued to their ambassadors concerning negotiations about newly found regions, and on which the defenders of the doctrine of effectiveness rely to justify their opinion. The most famous of these instructions are those of Charles V to his ambassador at the Portuguese Court, Juan de Zuniga, in the Mallucco Case. On December 18, 1523, the Emperor, on the one hand, writes: "The right of our ownership and possession was evident because of our just occupation. At least it could not be denied that we had based our intention on customary law, according to which newly found islands and mainlands belong to him who occupied and took possession of them first, and they remain his." On the other hand, Bleiber<sup>27</sup> suggests that one ought to deduce from the very fact of discovery, and indeed of anchoring on the shores of the islands being mentioned elsewhere in the same instructions, that Charles V was aware that these facts had legally some positive effect. Bleiber's deduction does not

<sup>26</sup> Adair, *The Exterritoriality of Ambassadors in the 16th and 17th Centuries* (1929), p. 3.

<sup>27</sup> Bleiber, *op. cit.*, p. 17.

convince us. The instruction itself shows the legal significance imputed to the bare fact of discovery, and the quotation, for instance, "Nor has the King of Portugal's fleet touched at the islands or anchored on their shores," can in connection with the whole passage be understood only in the following sense: "As the Portuguese fleet has not even touched at the islands or anchored on their coasts, still less could the King of Portugal have taken possession of the islands in any legally effective way."

The question we have to deal with played a large part again in the negotiations between Spain and Portugal in 1528 and 1529 which led to the Treaty of Saragossa, on April 22, 1529. Bleiber<sup>28</sup> finds in the rather ambiguous text of that treaty evidence for his assertion that at some time discovery or symbolic annexation was deemed to grant full territorial sovereignty over newly found regions. We cannot agree with Bleiber. In our opinion, the text of the treaty can be urged rather to disprove than to confirm Bleiber's thesis. The definite treaty, indeed, stipulates that "should the Spaniards discover or find any islands or lands while navigating within the said line, such islands or lands shall belong freely and actually to the said lord the King of Portugal and his successors, as if they were discovered, found, and taken possession of by his own captains and vassals at such time,"<sup>29</sup> and does not speak of actual occupation. But it cannot be considered without regard to legal opinions expressed during the negotiations and in former drafts which preceded the final, and rather ambiguous, wording. Davenport<sup>30</sup> quotes one of those drafts which contains the following passage:

It has been stipulated and agreed between the aforesaid kings of Castile and of Portugal . . . that none of these kings should set *foot on*, discover or *occupy* . . . any land within the limits and the boundaries of the other; and should the one *occupy* now or in future any land within the limits of the other, *restitution* should be made on request . . . as soon as possible to the king between whose boundaries and limits it is contained.

This draft speaks indeed of effective occupation. "To occupy" and "to discover and find" seem to be used during these negotiations nearly as synonyms and interchangeable. It is hardly possible therefore to draw any conclusion in the matter from the wording of the treaty in question.

### III. THE THIRD PERIOD 1550-1800

(a) *France and England emphasize the importance of actual occupation against Spanish claims.* By the appearance of other Powers, such as France and England, which opposed the Spanish and Portuguese claims to sovereignty over three-quarters of the world in the middle of the 16th century, a turning point occurred in the conception of the significance of symbolic an-

<sup>28</sup> Bleiber, *op. cit.*, p. 67.

<sup>29</sup> Davenport, *European Treaties Bearing on the History of the United States*, Vol. I (1917), p. 192.

<sup>30</sup> Davenport, *op. cit.*, p. 147.

nexation. It was but natural that these Powers, making "their way into the distant regions from which the Pope, Portugal and Spain desired to exclude them,"<sup>31</sup> were inclined to deny the validity of symbolic annexation and laid stress upon the necessity of actual occupancy. On the other hand, both Spain and Portugal, which in their mutual relations and disputes had not seldom emphasized the necessity of effective occupation, began to repel their new common enemies by pointing out the full value and sufficiency both of the Papal donations and of discovery and symbolic annexation as possessory titles.

To show that even in the 16th century effective occupation was required for the acquisition of sovereignty over newly found regions, negotiations between France and Spain at Château-Cambrésis, in 1559, are quoted nearly as often as the above-mentioned Spanish-Portuguese *pourparlers* preceding the treaty of 1524. According to Davenport,<sup>32</sup> the French delegates at Château-Cambrésis, "making a distinction used by the English merchants during the Anglo-Portuguese negotiations of 1555, would not agree to excluding Frenchmen from places discovered by them and not actually subject to the kings of Portugal or Castile." They would only consent "that the French keep away from lands actually possessed by the aforesaid sovereigns." Davenport quotes two letters on these negotiations one of which is of particular interest. On March 13, 1559, the Spanish plenipotentiaries at Château-Cambrésis wrote to King Philip II of Spain as follows:

We have discussed for a long time the question of prohibiting the French from sailing to India; but we have not succeeded in inducing them to exclude their subjects from such navigation entirely, nor to confine it at least within certain limits in such a way that they should not be allowed to go to such places which are discovered by us, but are not actually subject to the King of Spain or Portugal. They are willing only to consent not to go to the territories actually possessed by Your Majesty or the King of Portugal. . . . They allege the ordinary argument that the sea is common and free, while we are relying upon the principles laid down in the bulls of Pope Alexander and Jules II . . . and pointing out that it would be in no way right that other States come to enjoy the work and the expenses made by others in order to discover India.

The same arguments were put forward against Spanish pretensions almost twenty years later by the English, who seem to have emphasized from the beginning of their colonial activity the importance of actual occupation. We mentioned above the first English charters issued by Henry VII to Cabot in 1496 and 1502, and by Queen Elizabeth to Sir Humphrey Gilbert in 1578, and to Sir Walter Raleigh in 1584. The most precise statement of the English attitude in the matter is in Queen Elizabeth's reply to Mendoza, the Spanish ambassador at her court, in 1580. According to Goebel,<sup>33</sup> the Queen did not only reject the reliance on Papal donations as sufficient basis

<sup>31</sup> Davenport, *op. cit.*, p. 2.

<sup>32</sup> Davenport, *op. cit.*, p. 220.

<sup>33</sup> Goebel, *op. cit.*, p. 63.

of a sovereign title to newly-found lands, and alleged, as the French commissioners did twenty years before, "the ordinary argument that the sea is common and free," but she also pointed out that "she would not persuade herself that the Indies are the rightful property of Spain . . . only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory, acts which cannot confer property. So that . . . this imaginary proprietorship ought not to hinder other princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the law of nations."

(b) *The later English attitude.* Davenport<sup>34</sup> points out that "since 1555 the claim that Englishmen had a right to visit such parts of the Indies as were not actually held by Spain had been maintained," and instructions to English commissioners for negotiations with Spain in 1587, 1600 and 1604, quoted by Hyde,<sup>35</sup> show indeed that the principle which was embodied in the charter granted to the English East India Company on December 31, 1600, that the ascertaining of the existence of territory and the formal taking possession might not suffice to create a complete right of property and control, and that no State is allowed to prohibit merchants of other States from visiting places not actually occupied by itself, was the basis of the English policy. The following passages in the instructions of 1587 and of May 22, 1604, may be quoted. The instruction of 1587 reads:

And likewise it is no reason by a large naming of the Indies, to bar our merchants to trade in any place discovered or to be discovered by our own people where neither in the time of the Emperor Charles nor of the King that now is, any Spaniard, Portuguese, or any other Christian people have had any habitation, residence, or resort.

The instruction of 1604 runs:

And yet because it shall appear that we will not be found unreasonable . . . we are contented to prohibit our subjects from all repairing to any places where they—*viz.*, the Spaniards—are planted, but only to seek their traffic by their own discoveries in other places, whereof there are so infinite dimensions of vast and great territories, as they have themselves no kind of interest in it, but trade with divers great kings of those countries but as foreigners and strangers, from which to bar us by accord, seeing it is not in his—*viz.*, the Spanish King's—power to do it by force . . . were both an unkindness and an indignity to be offered.<sup>36</sup>

In order to show that "into the opening years of the 17th century . . . there was no pretension that discovery could be the source of title," Goebel<sup>37</sup> refers to the official English attitude in later disputes with Spain and the Netherlands in 1621. True, in these disputes the principle question was not

<sup>34</sup> Davenport, *op. cit.*, p. 5.

<sup>36</sup> Davenport, *op. cit.*, p. 247.

<sup>35</sup> Hyde, *op. cit.*, p. 164.

<sup>37</sup> Goebel, *op. cit.*, p. 111 ff.

whether discovery or symbolic annexation could confer sovereign rights, but, after a territory had been appropriated by symbolic acts or partial occupation, to what extent could it be considered to be taken in possession. Goebel's conclusion from the quoted passages may seem therefore somewhat unfair. They show, however, the great importance the English laid on actual occupation. In the dispute with Spain, the English point of view "on the rights over the new territories was expressed in the House of Commons by Sir Edward Sandys, who requested that the King's right to the Amazon land be considered 'that plantation there being first made by his subjects about twelve years ago.' He then denied the validity of the bull of Alexander VI to give title; and added that 'if the King will not take on him the sovereignty of that country and territory, yet, it being a vast country, it is by the law of nations and nature the occupiers; for in such cases *Seges est occupantis*, it is a good title and claim.' In the same year, Sir Dudley Carter was instructed to use similar language in protesting against the projected Dutch colony at Manhattan. The instruction reads: 'You should represent these things unto the States General in His Majesty's name (who, *jure primae occupationis*, has a good and sufficient title to those parts) and require of them that as well those ships as their further prosecution of the plantation may be presently stayed!'"

(c) *The discovery of, and the acquisition of sovereignty over Australia.* In speaking of the "large naming of the Indies," and of the "infinite dimensions of vaste and great territories" over which the Spaniard claimed sovereignty on the basis of their discovery and bare symbolic annexation, these instructions to English negotiators allude to the principal objection which was adduced at all times against the assertion that a symbolic act gives sovereign rights. Apart from the case when a small island is in question, no standard can be found as to what space of land is taken into possession by the planting of landmarks and the hoisting of flags on a few points here and there on the coast. There is no criterion to define whether by such a symbolic act sovereign rights are acquired over the whole of a continent, or only over land within a certain radius in the centre of which the landmark is fixed. The history of the acquisition of Australia may be adduced as an example of that difficulty which, except in the case mentioned of symbolic annexation of a small island, nearly always arises. Besides, the early history of Australia shows again that in the 17th and 18th centuries bare symbolic annexation was considered not to grant full sovereign rights over newly found regions, but only an inchoate title which finally perished unless followed and perfected by actual occupancy within a reasonable time.

Bleiber<sup>38</sup> quotes the instruction which in 1642 the Dutch gave to Tasman, Australia's first explorer: "You are to take possession everywhere . . . by means of posts and plates, and declare an intention . . . to *establish a colony*," as well as the instruction to Cook, issued by King George III of England in 1770: "If you find the country *uninhabited*, take possession of it for

<sup>38</sup> Bleiber, *op. cit.*, p. 69.

His Majesty by setting up proper marks and inscriptions as first discoverers and possessors." Part of the same immense territory annexed by Tasman in 1642 on behalf of the Netherlands by means of a symbolic act was taken possession of by Cook in the same way in 1770 by hoisting the English flag on the coast of New Holland. But, contrary to the Dutch attitude 130 years before, the English hastened to perfect the symbolic annexation of 1770 by starting an actual occupation in 1788. In the first years of the 19th century that occupation, without any legal objections by the Dutch, extended to the very region where 150 years before Tasman had planted landmarks containing the Dutch insignia. It may be noted that it was probably not the Dutch (who gave the continent their name) but the Portuguese who were the first to discover Australia and take possession of it by symbolic acts.<sup>39</sup>

(d) *The contemporary doctrine.* While we could establish that in the practice of nations from the end of the 15th century a growing inclination existed to regard the symbolic act of annexation of a newly found country as at least an inchoate title, and while it does not seem unwarranted to consider the introduction of the notion of the "inchoate title" into the practice of nations as a result of the synthesis of the two opposing attitudes of the Iberian and the Non-Iberian colonizing Powers in the manner which we tried to illustrate from a few official pronouncements, contemporary theorists deemed such symbolic acts to be completely ineffectual. We mentioned Gryphiander who emphasized in his treatise on islands that the material seizure of an island is required,<sup>40</sup> and Grotius' famous dictum that "to find" does not mean "to assume by ocular proof," but "to seize."<sup>41</sup>

Vattel was the first who combined the dogma of doctrine with the experience of the practice of States. "After a State has sufficiently shown," he said, "its will in the matter, another cannot deprive it. . . . Thus navigators who are invested with a commission from their sovereigns and going on a voyage of discovery come across islands or other vast lands, have always taken possession thereof on behalf of their nation; and usually that title has been respected, provided it has been followed later by actual possession."<sup>42</sup>

The modern Anglo-Saxon theory of the inchoate title, acquired by a symbolic act and to be completed in due time by actual occupation, is based on this famous passage. The argument has been raised against that doctrine<sup>43</sup> that there is no rule as to the delay after the formal act of annexation within which the effective occupation has to be performed. There seems to be no criterion as to the period involved by the expression "due and reasonable

<sup>39</sup> Jose, *History of Australasia* (1909), *passim*.

<sup>40</sup> Gryphiander, *Tractatus de Insulis* (1623), p. 268.

<sup>41</sup> Grotius, *Mare Liberum* (New York, 1916), p. 11.

<sup>42</sup> Vattel, *Le Droit des Gens* (Washington, 1916), p. 196.

<sup>43</sup> Cf. Bleiber, *op. cit.*, p. 64.

time." This objection is not fair. Certainly, a precise number of years cannot be indicated. But, as Fuglsang<sup>44</sup> pointed out, any rigid stipulation in the matter would be contrary to the sense of an inchoate title.

If international law grants an inchoate title to the discovering State, it does it in order to give the State the possibility to enjoy the effects of its discovery. Therefore, it needs a certain time to ascertain whether an effective occupation would be possible and politically feasible, and whether it would be worthwhile, and it needs time again to perform the occupation. . . . The exact space of this time depends always on the facts in the concrete case. The term of one year, as proposed by Fauchille, as well as that of 25 years, suggested by Field and Fiore, may be sometimes too short, sometimes too long a delay.

#### IV. THE FOURTH PERIOD: THE RULES OF THE PRESENT TIME. (ATTEMPT AT A CONSTRUCTIVE THEORY)

(a) *General remarks.* The question whether symbolic annexation gives any sovereign rights over newly found lands arose again when in the 19th century the Great Powers began to build up colonial empires. Both the doctrine and practice of this time were greatly influenced by a rigid theory which recognized effective occupation to be in every possible case the only sufficient title of territorial sovereignty. But while the practice of nations soon broke the narrow frame of that theory, it was only in recent years that the doctrine of international law was evolved to soften the frozen rigidity of that dogma. To the best of my knowledge, Verdross in his lectures on *General rules regarding the law of peace*, which he gave at The Hague in 1929, and again Smedal in his outstanding work on the *Acquisition of sovereignty over polar territories*, were the first to arrive at a true interpretation of the facts by combining both the principle of effectiveness with that of the "international standard," and by disclosing the intrinsic sense of effective occupation. Effectiveness, according to Verdross,<sup>45</sup> means "displaying only such activity as would be shown, under analogous circumstances, by any State normally organized," or, as Smedal<sup>46</sup> asserts, "the ability to secure respect for acquired rights, freedom of traffic and transit together with the maintenance of order" within the regions in question. It is owing to that new conception of effectiveness, with its defining-lines drawn by the "international standard" and by the intrinsic aim of the rule, that the prospect was opened towards the wide world of facts, and the way was cleared for observations of political reality. These observations have revealed three important rules of international law implicit in the general principle of effectiveness. We may phrase these rules in the following way:

- (1) Without prejudice to the general principle which requires effective oc-

<sup>44</sup> Fuglsang, *op. cit.*, p. 95 ff.

<sup>45</sup> Verdross, "Règles générales du droit international de la paix," *Académie de Droit International, Recueil des Cours*, 1930, p. 99.

<sup>46</sup> Smedal, *De l'acquisition de souveraineté* . . . (1932), p. 51.

cupation, sovereignty over a region completely uninhabited and seldom frequented is acquired merely by symbolic annexation.

(2) Effective occupation as generally required does not imply its extension to every nook and corner. It is sufficient to dispose at some places within the territory of such a strong force that its power can be extended if necessary over the whole region in order to guarantee a certain minimum of legal order and legal protection within the boundaries, and to exclude any interference from a third State (virtual effectiveness).

(3) Besides effective occupation, geographic contiguity is recognized to be a full and sufficient sovereign title.

(b) *Distinction to be drawn between the acquisition of inhabited and uninhabited regions.* In the Clipperton Island Case the award of the King of Italy, of January 28, 1931, stated that, usually, to perfect the procedure of acquiring territorial sovereignty beginning with symbolic annexation, later occupation is necessary in order to enable the occupier to effect his exclusive rights and make his laws respected; but in exceptional cases, when completely uninhabited lands are concerned, it does not seem requisite, according to the award, to follow that procedure. Such territories indeed are, as the award stated, from the moment when the occupying State makes its appearance there, in absolute and undisputed disposition of that State.<sup>47</sup> It may be noted that symbolic annexation is not, as Bleiber<sup>48</sup> believes, the natural consequence of discovery. The award does not rely on the fact of discovery of the island by the French in 1857, but on the act of symbolic annexation in 1858.

The award in the Clipperton Island Case is in no way contradictory to the doctrine which recognizes effective occupation to be the only full possessory title. Effectiveness means actual display of sovereign rights; it means maintenance of a certain order corresponding to the international standard, which, of course, is different in territories sparsely inhabited and scarcely frequented by foreigners from what it is in densely peopled trading places; different in the motherland and in the colonies, and governed first of all by the aim of the maintenance of such order, *viz.*, the protection of the rights of other States, such as the right to integrity and inviolability in peace and war. Effectiveness finally means the guarantee of a minimum of protection to one's own subjects as well as to foreigners coming to the region. Effectiveness then seems to be best illustrated by the actual display of sovereign rights, the maintenance of order, and protection. But as a matter of fact sovereign rights can be exercised only over human beings, in inhabited lands; a certain order can be maintained only amongst human beings, *i.e.*, again in inhabited countries; and protection too can be granted only to human beings. It would be a misconstruction of the doctrine of effectiveness to say that sovereignty over completely uninhabited lands presupposes in every case actual occupation. From the essence of that doctrine the state-

<sup>47</sup> Bleiber, *op. cit.*, p. 91 ff.

<sup>48</sup> Bleiber, *op. cit.*, p. 91; cf. Smedal, *op. cit.*, p. 75 ff.

ment in the award must be accepted that the first unhindered appearance of a sovereign authority in an uninhabited region involves the actual acquisition of that territory.

The Bouvet Island Case is referred to nearly as often as that of Clipperton Island. The facts and legal situation are the same, *viz.*, acquisition of territorial sovereignty over an uninhabited island by symbolic acts such as hoisting the flag and reciting solemn declarations. Great Britain by her withdrawal in 1928 seems to have recognized the principle involved.<sup>49</sup>

The same rule seems to be applied in another arbitration which has been greatly discussed, *viz.*, that of the Queen of Spain in the Aves Island Case. In our opinion it is founded both on the geographic contiguity of the West Indian territories as a whole to which the island belonged, and also on the fact that the island, uninhabited and incapable of any habitation, was actually annexed by its discovery and symbolic appropriation by Spain.<sup>50</sup>

The same distinction between inhabited and uninhabited lands is drawn in the two most recent awards of the Hague courts dealing with territorial sovereignty. In the Island of Palmas Case the arbitrator pointed out clearly that "sovereignty cannot be exercised in fact at every moment on every point of a territory: The intermittence and discontinuity . . . necessarily differ according as inhabited or uninhabited regions are involved."<sup>51</sup>

And in the Greenland Arbitration Case the Permanent Court of International Justice, after establishing the principle that "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority," continued:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.<sup>52</sup>

It may be mentioned that a similar distinction between inhabited and uninhabited lands is made in a memorandum of the British Privy Council as early as 1722, to which Goebel<sup>53</sup> refers. As far as "a new and uninhabited country" is concerned, this memorandum presupposes that the country in question is placed under English sovereignty after being "found by English subjects," *i.e.*, by the symbolic act of annexation, while in the case of another, inhabited, country the memorandum states that "right and property

<sup>49</sup> Rabot, "*L'Ile Bouvet*," in *La Nature* (Paris, 1928), p. 387 ff.

<sup>50</sup> Lapradelle-Politis, *Recueil des Arbitrages Internationaux*, Vol. II (1924), p. 412 ff.

<sup>51</sup> Arbitration in the Island of Palmas Case, p. 18.

<sup>52</sup> Arbitration in the Greenland Case, p. 46; *cf.* Smedal, *op. cit.*, p. 51.

<sup>53</sup> Goebel, *op. cit.*, p. 106.

in its people is acquired" after the King has "conquered" the country, *i.e.*, by its effective occupation.

(c) *Virtual effectiveness: The general principle.* One can gather from the sense of effectiveness as shown above, that effective occupation cannot mean its extension to every nook and corner. If the invader disposes at some few places within the territory a force so strong that he can extend its power if necessary over the whole of the region in order to guarantee a certain minimum of legal order and protection within its boundaries, this seems to suffice to establish territorial sovereignty. As Max Huber said in the Island of Palmas arbitration, the sovereign power "must make itself felt through the whole territory."<sup>53a</sup> The consciousness of an existing power which is capable of being exerted everywhere<sup>54</sup> must penetrate the whole country, even if in fact such power, radiating from some points of support, becomes manifest only in relatively few acts displaying such sovereignty. In a given case on the one hand, the possibility, and on the other the fear, of a punitive expedition corresponds even more to the intrinsic sense of effectiveness than a police station in every kraal.

We may refer here, for instance, to the Delagoa Bay Case. In analyzing it Bleiber<sup>55</sup> seems to misconstrue the arbitration settlement. It is not only discovery, as Bleiber believes, but three different facts of equal importance on which the award of the President of the French Republic, of July 24, 1875, relies: (1) the discovery and symbolic annexation of the land in question by the Portuguese that gave them an inchoate title; (2) the fact "that in the 17th and 18th centuries Portugal has actually occupied some places on the northern side of the bay," so that she was enabled to "back up" her claims "to sovereignty over the whole of the bay and the coast . . . by armed force,"<sup>56</sup> *i.e.*, a fact which converted the inchoate title mentioned above into a perfect one; (3) the fact "that in 1817 England herself did not contest the rights of Portugal," *i.e.*, a tacit but definite recognition of the opponent's rights by the plaintiff which deprived the latter of the possibility of contesting the situation formerly recognized on the basis of existing law.

For us especially the second point is of outstanding interest. It seems to emphasize that the actual occupation of some places which enables the occupier to extend his authority, to display State functions, and to complement his possessory claims in a given case within the whole region, confers territorial sovereignty over the whole of the country in question. If one considers the proper meaning of effectiveness as shown above, the arbitration seems the only fair and possible decision which corresponds to its intrinsic sense.

If the fact that the first Portuguese school in Mozambique was opened in

<sup>53a</sup> Arbitration, p. 40.

<sup>54</sup> Cf. Smedal, *op. cit.*, pp. 52 and 54: "*capable d'y exercer un contrôle effectif.*"

<sup>55</sup> Bleiber, *op. cit.*, p. 77.

<sup>56</sup> Moore, *History and Digest of International Arbitrations* (1898), Vol. 5, p. 4984.

1799 after 300 years of Portuguese dominion seems to show to Bleiber that in the Delagoa Bay Case effective occupation is out of the question, Bleiber misconceives apparently the actual meaning of effectiveness.

(d) *Virtual effectiveness: Further historical instances.* It does not seem unjustified to say that principles similar to those which MacMahon applied in the Delagoa Bay Case, and Max Huber pointed out half a century later in such a masterly way, were probably at the basis of the proposal of conciliation made in 1885 by the Pope in the Caroline Islands Case.<sup>57</sup> In this proposal the Pope relied (1) on the fact that Spain discovered the islands, a circumstance which gave her, because followed by symbolic annexation, an inchoate title; (2) on the fact that the Spanish Government performed at different epochs a series of acts in support of the natives, facts which converted the inchoate title into a more perfect one. Although this can hardly be deemed sufficient, according to the international standard of our present day, "to render the Spanish sovereignty fully and unfailingly effective"—as the mediator pointed out in the second article of his proposal—yet such performance of governmental acts and functions seems to be in the mediator's opinion still of decisive importance: "If one considers," he says, "indeed the whole of the said acts . . . , one cannot disregard the gratifying work of Spain towards those islanders. It must be noted, besides, that at no time has any other government exercised a similar action on them." Thus in the agreement between Spain and Germany which adopted the Papal proposals, Germany "recognized the priority of Spanish occupation," and not only of Spanish discovery and symbolic annexation; for the above-mentioned acts of Spain, although not fully able "to render her sovereignty unfailingly effective," still implied occupation in a large degree, *i.e.*, certain actual manifestations of the display of territorial sovereignty, or, as we would say, virtual effectiveness.

It is especially in the Caroline Islands Case that Max Huber's dictum applies "that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances."<sup>58</sup>

On the other hand, the Caroline Islands Case seems in no way a precedent to prove the assertion that the bare fact of discovery alone grants full and perfect territorial sovereignty. Bleiber's arguments in this regard cannot convince us.

Following the same track, Bleiber refers to the annexation of Louisiana by France, which we consider on the contrary a fair and instructive example of what is really meant by effectiveness. First we quote Bleiber:<sup>59</sup>

<sup>57</sup> Moore, *op. cit.*, p. 5043.

<sup>58</sup> Arbitration, p. 40.

<sup>59</sup> Bleiber, *op. cit.*, p. 63.

The French claims to Louisiana were likewise based on discovery, and the explorer was made governor of the new colony. That effective display of sovereignty cannot be invoked in this case becomes evident by the fact that even after many years the immense area on both the sides of the Mississippi was inhabited by not more than 700 white men.

We do not think that Bleiber is right. In the case of Louisiana the question of acquisition of territorial sovereignty by means of symbolic acts only, hardly applies. True, on April 9, 1682, La Salle took possession of the land by erecting signs, hoisting the flag, and reading solemn declarations; but these symbolic acts were preceded or immediately followed by the setting up of small fortresses and the founding of other settlements. The very fact that the explorer was made governor shows the French intention of actual display of sovereign functions within the newly found land, and there can be established indeed from the inception a series of acts characteristic of State authority, exercised by France with regard to Louisiana, and of direct or indirect display of her sovereignty over that country, by which in a slow but continuous evolution French control and dominance were intensified, and spread itself out to every nook and corner; and finally French authority, if not perhaps exercised to the full, was at least felt in the most outlying points of the country.<sup>60</sup>

(e) *Bartolus on virtual effectiveness.* Our conception of effectiveness is in no way new or unknown. Even Bartolus, in his treatise *De Insulis*, pointed out that "an island is said to be occupied by the individual who enters it to occupy the whole; but it is not necessary that he survey and occupy every single clod of the island. . . ." Later he defines precisely what he means by occupation:

The question is whether the land where the occupier remains with his army seems to be occupied in order to belong to him as a whole. I answer: If he has taken possession of some places which he is able to maintain, although perhaps the whole territory is not yet taken, or of some castles or fortresses, or of some region between mountains and rivers:—in such case the whole territory becomes the occupier's. But if he cannot maintain it except by taking possession of the chief place, then even the place where he stays with his army does not become his own.<sup>61</sup>

For Bartolus the essence of occupation lies in the ability "to punish crimes committed within the region in question, and to mete out justice to people coming to that land in order to inhabit it." And when he emphasizes the necessity of actual occupation, he refers at the same time to the standard given by the "requirements of the matter," different of course in every single case.

(f) *The principle of contiguity.* Having once established the fact that effective display of sovereignty means, under certain circumstances, virtual

<sup>60</sup> Franz, *Die Kolonisation des Mississippi-tales* (1906), *passim*.

<sup>61</sup> Bartolus, *Consilia, Tractatus et Quaestiones* (1547), p. 137.

effectiveness, and that it is therefore sufficient, in order to annex a certain region, to have actually occupied a few places within the territory in question and settled there with a force, strong enough to extend its power over the whole of the country, we arrive necessarily at the conclusion that the actual occupation of one place involves the annexation of the whole region connected with it, and situated within a sphere capable of being ruled from it. We arrive at the conclusion, first, that a whole "group of very small islands may be acquired by one act of annexation and one settlement,"<sup>62</sup> viz., the actual occupation of the most important of the islands, and also that "the occupation of any *terra firma* is taken to include the presumption of possession of its adjacent unoccupied islands."<sup>63</sup>

While hitherto the objections we made against the dominant opinion about effectiveness concerned only the interpretation of that principle without questioning the maxim itself, we may now seem at first sight to touch its very existence in dealing with the acquisition of territorial sovereignty on the basis of geographic contiguity, and not of effective possession. Yet to a more thorough observation, the so-called rule of contiguity (*Grundsatz der geographischen Einheit*) is in no way opposed to the general principle of effectiveness, but it is on the contrary the logical consequence and natural application of that very principle in its intrinsic sense.

We have already mentioned the two most frequent cases of application of the rule of contiguity: the case of a group of small islands only one of which is actually occupied; and the case of an island which is adjacent to an actually occupied mainland. But these two cases do not exhaust the possibilities of applying the so-called rule of contiguity. A third instance occurs indeed in the arguments of the Venezuela-British Guiana Boundary Arbitration which reads: "He found there a waste region into which no trace of British occupation or influence has penetrated. Yet no one supposes that these uninhabited stretches constitute *terra nullius* . . . , for they formed part of a territory which, as a whole, the dominant possessed."<sup>64</sup>

We do not indeed think it sound to make a distinction between the principle of contiguity as applied in cases where islands are concerned, and that of "continuity" applied when there is question of regions belonging to the same *terra firma*. The so-called rule of "continuity" and that of contiguity are but different applications of the same general law.

The rule of contiguity is referred to very often in the practice of States. The principle, known even to Bartolus, who mentions it in his treatise *De Insulis*, occurs for instance in a note of King Philip III of Spain to England "where he bases the right of Spain to Virginia upon the principle of contiguity."<sup>65</sup> The acquisition both of the Marshall Islands by Germany, and

<sup>62</sup> Lawrence, *Principles of International Law* (5th ed., 1925), p. 152.

<sup>63</sup> Ferguson, *Manual of International Law* (1884), Vol. I, p. 100.

<sup>64</sup> Bleiber, *op. cit.*, p. 70.

<sup>65</sup> Goebel, *op. cit.*, p. 109. We may quote Bartolus' above-mentioned treatise on islands

of the Louisiade Archipelago by Great Britain, in 1885, was based on this principle; in the struggle for the Falkland Islands, in the Island of Aves Arbitration Case, the Lobos, Navassa, Pines, Lamu Island and Spitzbergen Cases it played a large part. We may deal only with a few cases which seem to have particular interest.

The Bulama Island Case is best suited to show both the close connection and the fluctuating boundary lines between the principles of virtual effectiveness and geographic contiguity. As in other arbitrations, that award relies on the two facts, first of discovery and symbolic annexation giving the Portuguese an inchoate title, and secondly of later occupation of some places within the territory in question, *viz.*, of Bissao and Guinala, which rendered the Portuguese title perfect. It is nearly impossible to say whether, in this case, it is preferable to speak of virtual effectiveness or of geographic contiguity as the foundation of the sovereign title. The advisory opinion given by J. C. Bancroft Davis admits contiguity. After laying down the general rule that all original acquisitions of sovereignty require actual occupation, the opinion runs as follows:

It is also to be remarked that islands in the vicinity of the mainland are regarded as its appendages: that the ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them. To apply these principles we find that from 1699 to 1768—how much later does not appear—Portugal had a settlement on the Jeba at Bissao and another at Guinala on the Rio Grande—that she asserted sovereignty over the whole country and over the island of Bulama which lies off the coast between the two; and that on occasion she took formal possession and exercised acts of sovereignty on the island. It is not denied that these acts gave her sovereignty over Bissao. But according to the principles laid down such a continued possession, with claim of dominion, vested in Portugal the sovereignty and carried with it, in the absence of anything to the contrary, the dominion over the island which was so near to the mainland.<sup>66</sup>

In criticizing the award, the doctrinal note on the Bulama Case, in the *Recueil des Arbitrages Internationaux*, edited by A. de Lapradelle and N. Politis, asserts that geographic contiguity, as well as discovery and symbolic annexation, is capable of granting only an inchoate title which must in due

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(*Consilia, Quaestiones et Tractatus*, p. 137) as follows: "Islands which are situated in the near proximity of the continent, are considered as belonging to this continent. . . . But if an island lies in the middle of the Ocean, the question is whether it can be regarded as being in the neighbourhood of another island," or the famous code of law of the Spanish king Alfonso the Wise, known as *Las Siete Partidas*, drawn up about 1265 (Vol. II, Madrid, 1807, p. 721), which clearly distinguishes between property and sovereignty: "It seldom occurs that new islands arise out of the sea. But if it should happen that a new island arises, we state that it must belong, as property, to whomsoever would colonize it first. But he, or they, who colonize it, owe obedience to the lord within the dominion of which the new island arose."

<sup>66</sup> Moore, *History and Digest of International Arbitrations* (1898), Vol. 2, p. 1919.

time be completed by actual occupation.<sup>67</sup> This assertion, we think, fails to grasp the real sense of the principle of contiguity. If one understands, as we do, that the cases where the practice of States refers to geographic contiguity as the basis of territorial sovereignty are in no way opposed to the general principle of effectiveness; if one considers on the contrary the so-called rule of contiguity to be the necessary consequence of a logical interpretation of the very principle of effectiveness and only a special case of applying that general principle, then one cannot regard geographic contiguity as conferring only an inchoate sovereign title. One has to admit that geographic contiguity with an occupied region gives the same full and perfect sovereign rights as any actual occupation.

(g) *Limits of the principle of contiguity.* The principle of contiguity plays a large part especially as far as the acquisition of territorial sovereignty over Polar regions is concerned. The "principle of sectors," largely discussed in Smedal's outstanding work, relies, as Smedal<sup>68</sup> and David Hunter Miller<sup>69</sup> point out, on the doctrine of contiguity. The Russian manifestoes both of September 29, 1916, and November 4, 1924, by which territorial sovereignty over certain Arctic islands was claimed, refer again to the rule of contiguity by asserting that the said islands form the "northern extension of the continental plateau of Siberia."<sup>70</sup> The idea of contiguity seems to occur even in the British declarations which in 1917 fixed the limits of the so-called Falkland Dependencies, and in 1923 put the Ross Sea Sector under the jurisdiction of the Governor-General of New Zealand.<sup>71</sup>

This extensive application of the principle of contiguity with regard to Polar regions particularly has induced Verdross as well as Smedal entirely to reject the doctrine. Smedal may be quoted:

By its lack of precision the doctrine of contiguity is wholly unable to serve the purpose of being the basis of any territorial revindication. What does contiguity mean in fact? Francis Joseph Land for instance is situated 300 km. from New Semlia, 1250 km. from Russia and 800 km. from Siberia: yet that archipelago is claimed to be under the sovereignty of Soviet Russia.<sup>72</sup>

We cannot agree with the learned author. The natural boundary lines of any application of the rule of contiguity are drawn, precisely, by its very origin from the general principle of effectiveness. Admitting the existence of such a rule, we only assert the existence of an individual case of applying the principle of virtual effectiveness as defined above. It is proper, therefore, to speak of contiguity only as far as one can speak also of virtual effectiveness. This does not imply, it may be noted, that the rule of contiguity applies only in the case of islands which are situated within the territorial waters of a certain State. The sphere of virtual effectiveness, *i.e.*, the

<sup>67</sup> Lapradelle-Politis, *op. cit.*, p. 616.

<sup>68</sup> Smedal, *op. cit.*, pp. 67 and 91.

<sup>69</sup> Hunter Miller, "Political Rights in the Arctic," in *Foreign Affairs* (1925), Vol. 4, p. 56.

<sup>70</sup> Smedal, *op. cit.*, p. 70.

<sup>71</sup> Bleiber, *op. cit.*, p. 94 ff.

<sup>72</sup> Smedal, *op. cit.*, p. 92.

sphere within which a certain State exercises a virtually effective and perceptible power, may sometimes coincide with the extension of its territorial waters, but it does not do this always or of necessity.

With regard to Polar regions, it is true, the rule of contiguity is referred to even when there cannot be any question of virtual effectiveness. But such unjustifiable reliance on this principle in certain cases cannot serve as proof against the existence of the principle itself. All unilateral exaggeration in practice diminishes the value of a doctrine which is founded on the observation both of numerous uniform facts and a general legal conviction, especially if such exaggeration is based on political reasons. This holds for the doctrine of effectiveness as well as for that of contiguity. But jurisprudence has to distinguish between exaggeration and truth, and must not refute a theory because of its unjustified abuse by statesmen.

## EDITORIAL COMMENT

### TREATIES AS DOMESTIC LAW

A number of articles have recently been published both in this JOURNAL and elsewhere discussing the possibilities of domestic legislation in the United States through the treaty-making power. Among these possibilities is that of extending the legislative power of Congress over subjects not otherwise within its jurisdiction by means of legislation to carry out treaty stipulations.

Most of these articles have assumed that this possibility was a new discovery, and the authors have presented themselves as discoverers of a means of constitutional legislation hitherto unexplored and of vast extent. Many of them have gone so far as to say that the Department of State of the United States has only lately realized that there existed in our Constitution this latent power to legislate through treaties.

For the sake of historical accuracy and a just appreciation of the wisdom of the statesmen in charge of our international relations in earlier years, it seems desirable to record that not only was this power known and exercised many years ago, but also that its limitations were better understood then than they seem to be now.

At the outset of the administration of Mr. Elihu Root as Secretary of State in 1907, he was confronted as a part of the unfinished business awaiting his attention in the Department with a group of unsettled questions with Canada. The Joint High Commission between the United States and Canada had been established in 1898 to adjust all pending questions in dispute between the two Governments. That Commission had met and considered and discussed these questions, which embraced some twelve or thirteen subjects, but unfortunately the Commission had failed to come to an agreement upon any of them. The obstacle to an agreement was the Alaskan boundary dispute upon which they could not agree, and, failing that, they were unwilling to agree upon any of the others.

The Alaskan boundary question fortunately had been disposed of before Mr. Root became Secretary of State, and, as it so happened, he had participated in the settlement of that question as one of the arbitrators on the part of the United States on the Alaskan Boundary Arbitration Tribunal in 1903. With that question out of the way, Mr. Root was satisfied that all of the other pending questions could be successfully dealt with through diplomatic negotiations. Accordingly, soon after he became Secretary of State he called upon the present writer, who had been the American Joint Secretary of the Joint High Commission, to act for him as special counsel and assistant in dealing with these questions.

It was decided at the outset that the first thing to be done was to settle

the policy of the Department as to the extent and limitations of the treaty-making power of the United States. Accordingly, the present writer, in his capacity as Counsel and Adviser to the State Department on these subjects, made a study and report as to the scope of the treaty-making power as affecting the questions to be dealt with. In making this report it was realized that it was necessary to deal with the subject primarily from the point of view of treaties as domestic law because the settlement of practically all of the questions under consideration involved the rights of American nationals within the United States.

The report, accordingly, was prepared on that basis. Secretary of State Root approved it without qualification, and ordered that it be printed and adopted by the Department as controlling its policy and action in negotiating treaties. This report was soon afterwards published in the first number of this JOURNAL with the title, "The Extent and Limitations of the Treaty-Making Power."

This reference to this report is of importance only as showing the official indorsement of the views expressed therein, which dealt with practically all of the questions which have since been raised, nearly all of which have now been settled by decisions of the Supreme Court sustaining the views expressed in the report.

The report opened with the two following propositions:

Where the treaty-making power is exercised by the sovereign power of a nation, the right to treat with other nations rests wholly in sovereignty and extends to every question pertaining to international relations.

Where, however, the treaty-making power is not exercised by the sovereign power of the nation as a whole, but has been delegated to a branch of the government by which it is exercised in a representative capacity, the treaty-making power there, although it arises from sovereignty, rests in grant, and can be exercised only to the extent of and in accordance with the terms fixed by the grant.

The second of the above-quoted propositions, as applied to treaties of the United States, is based on decisions of the United States Supreme Court, and has been indorsed by Secretary Root, who is generally recognized as having the ablest legal mind of our time, and yet it has been completely ignored by many of the modern commentators on the subject.<sup>1</sup>

The report then reviewed all the leading court decisions and Congressional reports down to that date involving the questions under consideration.

It was found that—

As will appear from the cases cited below, the treaty-making power has repeatedly exercised jurisdiction over matters beyond the reach of Congress and such exercise of jurisdiction has invariably been sustained by the Supreme Court. It will furthermore be shown that Congress is empowered, under the Constitution, to legislate with respect to matters

<sup>1</sup> See Professor Pitman B. Potter's article entitled "Inhibitions upon the Treaty-Making Power of the United States," published in this JOURNAL, Vol. 28 (1934), p. 456.

not otherwise within its jurisdiction, when such legislation is necessary to carry out treaty stipulations affecting such matters, provided always that they are matters directly touching the foreign relations of the nation and genuinely involving its international interest.

Relying upon these findings, Secretary Root early in his administration caused to be negotiated the Treaty Concerning Fisheries in the United States and Canadian Waters, concluded on April 11, 1908. This treaty provided for the adoption and enforcement of fisheries regulations by Congress in waters within the limits of the several boundary states along the Great Lakes over which Congress, in the absence of such treaty, would not have had jurisdiction. The proposed regulations were promptly adopted by Congress and have remained in force ever since.

So, also, in the administration of Secretary Knox, following the lead of Secretary Root, negotiations were initiated for a treaty with Canada protecting migratory birds. This treaty came into force in December, 1913, and was followed by Congressional legislation enforcing its provisions within the jurisdiction of the several states.

A similar Act of Congress had been adopted before this treaty came into effect, and had been declared unconstitutional by the Federal courts. Nevertheless, the Act passed after the treaty came into force, which clearly extended the jurisdiction of Congress over matters not within its delegated powers, was sustained by the Supreme Court as constitutional, and thus conclusively demonstrated that a distinction should be drawn between the jurisdiction of the treaty-making power and the jurisdiction of Congress in relation to the so-called reserved powers under the Constitution. It also definitely settled the authority of the treaty-making power to extend by treaty the jurisdiction of Congress for the purpose of enforcing the treaty stipulations.

This report also examined the subject of self-executing treaties. After reviewing the court decisions, it was found that the Supreme Court had determined that in order to operate as "the supreme law of the land" under Article VI of the Constitution a treaty must be self-executing. Self-executing treaties were defined as those requiring no legislative or Executive action to carry them into effect. It was held by the court that treaties which in themselves are incomplete as laws, or otherwise require legislation to make them operative, address themselves to the executive and legislative rather than to the judicial branch of the Government, and are not self-executing as the term is here used.

Whether or not this provision of Article VI making treaties the supreme law has any coercive force to compel legislative action to carry into effect treaties which are not self-executing is not directly dealt with in the decisions above referred to. Citations on that point are not necessary, however, for it is clear that if this provision making treaties the supreme law of the land does not prevent Congress from repealing by later legislation treaties which

are self-executing, there is no coercive effect beyond the moral obligation arising from national good faith and honor, and the obligation to make operative a treaty requiring legislative action to carry it into effect is no greater than the obligation to leave undisturbed a treaty already in force.

A treaty, therefore, under this provision of Article VI, as construed by the Supreme Court, has the value of a law of the land, so far as the judicial branch of the Government is concerned, only with the consent of the legislative branch of the Government.

It may be noted here that very few treaties are strictly self-executing.

So far as penalties are concerned, treaties do not carry provisions for the punishment of treaty violations. It would be quite inappropriate for governments to stipulate what penalties should be imposed upon their respective nationals within their own jurisdiction for treaty violations. As above noted, the migratory birds treaty required Congressional legislation to give it effect, and the Treaty Concerning United States and Canadian Fisheries expressly provided that Congressional legislation should be adopted establishing rules and regulations governing the use of those fisheries.

It must also be noted that a number of limitations are imposed by the Constitution upon the making of treaties which operate to prevent their becoming self-executing without the concurrence of Congress. For example, the treaty-making power can not override the powers delegated elsewhere, nor deprive the other branches of the Government of the right to exercise the powers entrusted to them by the Constitution. As an illustration of these limitations, attention is called to two subjects which are confided to Congress exclusively by the Constitution. The views expressed in Congress and by the courts and by authoritative writers on the subject show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties, treaty stipulations can not be regarded as self-executing, and require legislative action to carry them into effect.

The report also raised the question, which at that time had not as yet been passed upon by the Supreme Court, whether the treaty-making power could effectively adopt international regulations dealing with economic questions, such, for example, as the universal improvement of labor conditions, or regulations in conflict with the police powers of the state. On this question the report finds that it would be necessary, in dealing with such questions, that the contemplated action should fall within the general scope and purpose of the Constitution with respect both to the Nation and to the States, and also that it should be in accord with the underlying conditions inherent in the treaty-making power—namely, that it must be exercised to promote the general welfare of the American people and that the matters dealt with must directly concern the international interests or relations of the Nation. Accordingly—

If it appears that these requirements are fulfilled actually as a matter

of fact, and not as a mere subterfuge for exercising the power, then in the light of the decisions of the Supreme Court above cited, sustaining the jurisdiction of the treaty-making power over some of the so-called reserved powers, it is difficult to assign any reasonable ground for denying it jurisdiction over the other so-called reserved powers in the cases suggested. It has already been argued that inasmuch as the reserved powers all stand on the same footing in their relation to the treaty-making power, and in view of the terms of the provision making such reservation of powers, the right to exercise jurisdiction over any of them implies the right to exercise jurisdiction over them all. The question of the police powers was left open as a possible exception, but no well-defined distinction can be drawn between the police powers and the other so-called reserved powers in relation to the treaty-making power, and no conclusive reason appears for making an exception of them in this connection.

In conclusion, the report found that—

In the light of these opinions it cannot well be denied that the treaty-making power is a *national* rather than a *federal* power, and this distinction measures the whole difference between its jurisdiction and the jurisdiction of Congress in relation of the so-called reserved powers.

In view of the foregoing considerations, it is evident that in order to make use of the treaty-making power as an agency for domestic legislation, a number of conditions and limitations will be encountered which materially limit the scope of that method of legislation. A useful field is thus offered for further examination and discussion of the subject of to what extent and within what limits domestic legislation can be accomplished through the exercise of the treaty-making power.

In connection with this subject there are two other questions which require consideration.

One question of interest is, What is the status of domestic legislation enacted by Congress on the authority of a treaty extending its jurisdiction when the treaty justifying such legislation is terminated?

The other question is, What can be accomplished in the way of domestic legislation by inter-state agreements sanctioned by Congress in accordance with the provisions of Article I, Section 10, of the Constitution?

CHANDLER P. ANDERSON

#### THE CONSTITUTION OF THE PHILIPPINES

On May 14, the qualified electors in the Philippines accepted by an overwhelming vote the constitution submitted to them as drafted by the Philippine Constitutional Convention and approved by President Roosevelt as being within the terms of the Tydings-MacDuffie Act.<sup>1</sup> The total vote cast was strangely small (barely fifty per cent. of the qualified electors voting), considering the importance of the matter and the large percentages of par-

<sup>1</sup> Statutes of Congress, 73rd Cong., 2nd Sess., Chap. 84 (Session Laws, 1934, I, 456).

ticipating voters in elections to the Philippine Assembly. For the first time in the history of the Philippines, women were allowed to vote, and it would appear that more than one-third of the votes in the plebiscite were cast by women. The result, therefore, does not show the extent to which the peoples of the Philippines desire independence, but that there was no considerable opposition to independence is manifest.

Under the Tydings-MacDuffie Act, a period of ten years of commonwealth-status was provided for, at the expiration of which full and complete independence is granted. The Constitutional Convention, elected under the terms of the Act, sat from early in October until the latter part of February, when it adopted a draft which was submitted to President Roosevelt for his approval. A preliminary draft was prepared by a sub-committee of nine between October 9 and 20, and this was ultimately adopted by the convention without substantial change. Its contents are derived, both in substance and in form, in very large measure, from the federal and state constitutions of the United States. The plan is for a unitary form of the presidential-congressional type, with a unicameral legislative assembly having large powers.

For the present purpose, comment must be limited to those features which have to do with foreign affairs. The constitution repeats the provisions of the Tydings-MacDuffie Act governing the period of the Commonwealth. During that decade foreign affairs are to be under the direct supervision and control of the United States. No loans are to be contracted elsewhere than in the Philippines or in the United States without the approval of the latter. All legislative acts affecting currency, coinage, imports, exports, and immigration must be approved by the President. All of the military forces of the Philippines may be called into the service of the United States, which continues to have the right to maintain its military and naval reservations and forces there.

The form of government proposed in the constitution is to come into existence with the inauguration of the Commonwealth and to remain unchanged with the era of independence. The powers of government, however, are naturally enlarged with the assumption of independence, especially the executive power. As in the United States, the president will appoint ambassadors, other public ministers and consuls, subject to confirmation by a commission composed of twenty-one members of the legislative assembly. The president, likewise, is to "receive" ambassadors and public ministers. Treaty-making is in the hands of the president, "with the concurrence of a majority of all the members of the national assembly." While no explicit statement is made that treaties are to be the supreme law of the land, such is evidently the intention, as they, like statutes, are to be subject to judicial review. Article VIII, Section 10, provides that "no treaty or law (*sic*) may be declared unconstitutional without the concurrence of two-thirds of all" the eleven members of the Supreme Court of the Philippines. Following

the example of Spain, the Philippine Constitution adopts a portion of the Kellogg-Briand Pact and renounces war as an instrument of national policy. Likewise, following Spain, as well as Estonia, Latvia, Germany, and Austria, the Philippines adopt "the generally accepted principles of international law as a part of the law of the nation." What such provisions amount to by way of limitations upon government, under a constitution prepared upon the American theory of constitutional limitations, is difficult to foretell. In the European constitutions which contain these provisions, the limitations are generally political rather than legal, and hence they may be regarded as counsels of perfection which do not actually limit government otherwise than by popular control.

While the United States, under the Tydings-MacDuffie Act, may intervene during the Commonwealth for the preservation of government under the constitution, no such right analogous to the Platt Amendment will survive into the era of independence. Then the United States, so the Congressional Act declares, shall "withdraw and surrender all right of possession, supervision, jurisdiction, control or sovereignty" in and over the Philippines. American naval stations and reservations are excepted, but no promise is made to the Philippines of their defense. What the future naval policy of the United States will be, as regards the Philippines, remains to be seen. Much will depend upon what, if anything, will be done along the line of the recommendation of the Tydings-MacDuffie Act, which requests the President of the United States, *at the earliest practicable date*, to enter into negotiations with foreign Powers with a view to the conclusion of a treaty "for the perpetual neutralization of the Philippine Islands if and when independence shall have been achieved." Clearly, if this be attempted, a complete reshaping of American policy in the Far East may be indicated. Certainly there should be an immediate re-appraisal of American interests in that quarter of the world, in the light of the various factors involved in our renunciation of a major responsibility in the Pacific.

The Philippine constitution now having been adopted, elections under it are to be held shortly and it is expected that the government of the Commonwealth will be inaugurated, possibly by October 15 next, and certainly by January 1, 1936, at the latest. By January 1, 1946, therefore, the Republic of the Philippines will come into existence as a fully independent state. In the meantime, it will have in effect dominion status, fully self-governing, the sole civil representative of the United States being a Resident High Commissioner, whose duties are to be supervisory rather than executive—mere shadows compared with the present pro-consular powers of the Governor General.

J. S. REEVES

## THE WORLD COURT INTERPRETS ANOTHER INTERNATIONAL AGREEMENT

The Permanent Court of International Justice in its Advisory Opinion of April 6, 1935,<sup>1</sup> concerning Minority Schools in Albania, proceeded along lines which, according to the dissenting opinion of Sir Cecil Hurst, Count Rostworowski and M. Negulesco, involve a departure from principles previously adopted by the court in the interpretation of treaties.<sup>2</sup> Such impressive testimony inspires inquiry as to the character of that departure.

The precise question before the court was whether, regard being had to the Albanian Declaration made before the Council of the League of Nations on October 2, 1921, as a whole, the Albanian Government was justified in its plea that, as the abolition of the private schools in Albania constituted a general measure applicable to the majority as well as to the minority, it was in conformity with the letter and the spirit of the stipulations laid down in Article 5, first paragraph, of that Declaration.<sup>3</sup> The Declaration was an international instrument of which the stipulations were recognized as fundamental laws of Albania, and contained stipulations in relation to minorities which were declared to constitute obligations of international concern to be placed under the guarantee of the League of Nations.<sup>4</sup> Articles 206-207 of the Albanian Constitution of 1933 announced that "Private schools of all categories at present in operation will be closed."<sup>5</sup>

The court concluded, by eight votes to three, that the plea of the Albanian Government was not well founded. It reached that conclusion after examining the text of the Declaration, the circumstances leading up to its acceptance embracing a memorandum of the Greek Government of May 17, 1921, a report of Mr. Fisher, a British representative on the Secretariat of the League of Nations concerning the responsiveness of the Albanian Declaration

<sup>1</sup> Publications, Permanent Court of International Justice, Series A/B, No. 64.

<sup>2</sup> The opinion, according to the dissenting judges, "involves to some extent a departure from the principles hitherto adopted by this Court in the interpretation of international instruments, that in presence of a clause which is reasonably clear the Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added to it or substituted for it, and this even if the results following from it may in some particular hypothesis seem unsatisfactory." (*Id.*, 25-26.)

<sup>3</sup> According to Article 5 of the Declaration: "Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

"Within six months from the date of the present Declaration, detailed information will be presented to the Council of the League of Nations with regard to the legal status of the religious communities, Churches, Convents, schools, voluntary establishments, and associations of racial, religious and linguistic minorities. The Albanian Government will take into consideration any advice it might receive from the League of Nations with regard to this question." (*Id.*, 5.)

<sup>4</sup> The complete text of the Declaration is contained in Annex III, *id.*, 35-36.

<sup>5</sup> *Id.*, 5.

to the suggestions in the Greek memorandum, a letter of February 9, 1921, from the President of the Albanian Council of Ministers, and other relevant data extrinsic to the document. It considered also the contention of the Albanian Government that no obligation was imposed upon it in educational matters other than to grant to minorities a right equal to that possessed by other Albanian nationals—a conclusion which it was alleged followed “quite naturally from the wording of paragraph one of article 5,” as well as the contention that as the minority régime constituted a derogation from the ordinary law, the text in question should, in case of doubt, be construed in the manner most favorable to the sovereignty of the Albanian State.<sup>6</sup> The court adverted to the opposing Greek view that the equality of treatment referred to in the treaty was merely an adjunct to the right granted to minorities to retain existing schools.<sup>7</sup>

The court concluded that what the Council of the League of Nations asked Albania to accept, and what Albania did accept, was a régime of minority protection substantially the same as that which had been already agreed upon with other states in which there were no “communities.”<sup>8</sup> Discussing the idea underlying the treaties for the protection of minorities, the court declared that two things had been regarded as particularly necessary and had formed the subject of treaty provisions. The first was to ensure that nationals belonging to minorities should enjoy perfect equality with the other nationals of the state; and the second was to ensure for the minority “suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.”<sup>9</sup> The court then adverted to the close similarity between the Polish treaty of June 28, 1919, for the protection of minorities, and the Albanian Declaration of October 2, 1921. It then proceeded to examine textually Articles 4 and 5, as well as 6, of the Declaration, and derived therefrom the conclusion that the members of the minority in Albania were always to enjoy the rights stipulated in the Declaration, and, in addition, any more extensive rights which the state might accord to other nationals.<sup>10</sup> In a word, the court appeared to conclude that the “intention was to grant to the minority an unconditional right to maintain and create their own charitable institutions and schools,”<sup>11</sup> and that any lesser grant would result in “inequality in fact.”<sup>12</sup>

It is not here sought to discuss the soundness of this conclusion, but rather

<sup>6</sup> Publications, Permanent Court of International Justice, Series A/B, No. 64, 15.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, 16. Compare the Greek contentions concerning this point. *Id.*

<sup>9</sup> *Id.*, 17. The French text assumes a happier form than the English translation. The former makes reference to “*des moyens appropriés pour la conservation des caractères ethniques, des traditions et de la physionomie nationales.*”

<sup>10</sup> The court said in this connection: “The right provided by the Declaration is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority.” (*Id.*, 20.)

<sup>11</sup> The language quoted is taken from the minority opinion, *id.*, 25.

<sup>12</sup> *Id.*, 19.

to emphasize the fact that the court undertook to interpret a paragraph that was in the estimation of the minority "clear and simple" by reference to extrinsic data and to find therein evidence of a design that ran "counter to the natural sense of the words."<sup>13</sup> There was no primary deference for or reference to linguistic clearness, and no intimation that from the form of the text there was to be deduced an authoritative and uncontradictable standard of interpretation. This circumstance drew from the minority criticism of the method employed.<sup>14</sup> Instead, however, of relying solely on this ground of objection, the minority declared that the conclusion of the court interpreting the Albanian Declaration as conferring "an unconditional right" not only ran counter to the natural sense of the words, but also disregarded the explanation of the corresponding provision of the Polish treaty as given in the letter from M. Clemenceau in 1919, addressed to M. Paderewski, the leader of the Polish delegation, to the effect that the grant was a mere prohibition of discrimination; and it was added that the opinion of the court took no sufficient account of the events leading up to the preparation of the text of the Declaration.<sup>15</sup> It is not necessary here to pass upon the value or soundness of this stricture.

What stands out in the case is the fact that the eleven judges before whom the adjudication was had made use of data leading up to the preparation of the text of the Declaration as an aid to interpretation, the minority by way of confirming what they deemed the natural sense of the words employed in the text to demand, the majority as a primary means of establishing the design of the parties, regardless of the form of the text. The latter, in so doing, inspired the statement referred to above that the court was departing from principles which it had previously adopted. This statement as to the adoption of principles of interpretation deserves elucidation. In its work of interpreting treaties since 1923, when it rendered its first judgment in the case of the *S.S. Wimbledon*,<sup>16</sup> the court has not been confronted with a situation where conclusions which it deduced from the natural sense or the linguistic clearness of a text were, in its opinion, contradicted by extrinsic evidence from any source. Moreover, in cases where it has expressed the view that it did "not intend to derogate in any way from the rule which it has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself,"

<sup>13</sup> The language quoted is taken from the minority opinion, *id.*, 24 and 32.

<sup>14</sup> *Id.*, 25-26, and 32.

<sup>15</sup> The minority said, in this connection: "This interpretation takes no sufficient account of the events leading up to the preparation of the text of the Declaration, in particular of the fact that the Greek Government asked for the insertion of a provision which would have conferred an unconditional right and made this request upon the ground that it was necessary in the case of Albania to go beyond the usual provisions of a minority treaty, and of the fact that the Council, instead of inserting the Greek proposal, used a wording on the same lines as that adopted in other minority treaties." (*Id.*, 32.)

<sup>16</sup> Publications, Permanent Court of International Justice, Series A, No. 1.

the court has been scrupulous to examine the preparatory work and seek therein confirmation of its views.<sup>17</sup> It is still a significant fact that the cases have thus far manifested a striking absence of conflict between extrinsic evidence and what the plain or natural meaning of a text seemed to demand. On the other hand, the court appears to be increasingly aware of the danger of concluding that textual or linguistic clarity is necessarily indicative of clearness of design of the parties to an international instrument, and perhaps, under the salutary influence of Judge Anzilotti's dissenting opinion in the case concerning the Interpretation of the Convention of 1919 concerning Employment of Women during the Night,<sup>18</sup> is reluctant to acknowledge that a text is verbally clear even when there is room for such a conclusion.<sup>19</sup>

In a word, the instant case reveals a departure in the method of approach which the court applies to the cases confronting it and justifies, in that regard, the testimony to that effect that is borne by the minority. An experience of twelve years has brought home to a great tribunal a sense of the importance of approaching a text concerning the construction of which there is divergence of opinion in such a way as to minimize the danger of misconceiving the actual design of the contracting parties, as well as a realization of the fact that that danger is not diminished and may even be enhanced if there is sought to be imputed to those parties, as by an applicable rule, an obligation to employ terms in a sense that was not in fact responsive to their actual design. The opinion concerning the Minority Schools in Albania, apart from the character of the conclusions reached, shows that the court is making progress in the performance of its interpretative tasks by breaking away from conventional statements calculated to impair both its freedom and success in getting at the truth.

CHARLES CHENEY HYDE

#### ACTS AND JOINT RESOLUTIONS OF CONGRESS AS SUBSTITUTES FOR TREATIES

The failure of all efforts during the past twelve years to make the United States a member of the Permanent Court of International Justice, due to the opposition of a relatively small minority of the Senate (the vote on January 29, 1935, in favor of adherence to the protocols was 52; that against adherence was

<sup>17</sup> See Advisory Opinion of Nov. 15, 1932, concerning the interpretation of the Convention of 1919 concerning the Employment of Women during the Night, Publications, Permanent Court of International Justice, Series A/B, No. 50, 365, 378. See, also, the Advisory Opinion No. 2 concerning the question whether agricultural labor was embraced within the competence of the International Labor Organization, *id.*, Series B, No. 2, p. 41; Case of the *S.S. Lotus*, *id.*, Series A, No. 10, pp. 16-17; Advisory Opinion No. 14 concerning the jurisdiction of the European Commission of the Danube between Galatz and Braila, *id.*, Series B, No. 14, pp. 28 and 31; Advisory Opinion interpretative of the Statute of the Memel Territory (Preliminary Objection), June 24, 1932, *id.*, Series A/B, No. 47, p. 249.

<sup>18</sup> Publications, Permanent Court of International Justice, Series A/B, No. 50, 383.

<sup>19</sup> See Judgment in the Lighthouses Case between France and Greece, March 17, 1934, Publications, Permanent Court of International Justice, Series A/B, No. 62, 13.

36),<sup>1</sup> has recently aroused discussion as to whether there is not a procedure by which this object can be accomplished other than through adherence to a diplomatic protocol, which is assumed to require the approval of two-thirds of the Senate to make it effective. If a method of procedure consistent with the Constitution can be found which would obviate the necessity of this extraordinary majority in the Senate, the obstacle which has until now prevented the United States from becoming a member of the court can easily be overcome. It is believed that such a mode of procedure can be found in the action of Congress, in the form of an Act or joint resolution, either of which can be passed by a simple majority of both Houses, authorizing the President to adhere to the protocols, or simply declaring that the United States accepts membership in the court, subject of course in the latter case to the willingness of the signatories to admit the United States to membership under that procedure. It is submitted that a protocol under which the United States proposes to become a member of an international organization, especially one which does not involve for the United States any commitments or legal obligations further than the annual appropriation of a small sum of money to cover its share of the common expense for the maintenance of the organization, does not necessarily require ratification by the President by and with the advice and consent of the Senate two-thirds of the Senators present concurring.

In practice, the United States has often become a party to protocols which had the full force of international engagements but which were not subject to ratification by the President by and with the advice and consent of the Senate. Some examples may be found in Malloy's *Treaties, Conventions, etc. Between the United States and Other Powers*, pp. 152, 723, 854, 871, 932, 936, 1144, 1443, 1460, 1673, 1688, 1717, 1870 and 2006. Also Congress has frequently made appropriations of money for the support of international institutions when there was no treaty authorizing the appropriations. On May 2, 1932, Representative Linthicum introduced in the House a resolution appropriating \$53,895 as the share of the United States of the common expense for the maintenance of the Permanent Court of International Justice. The Committee on Foreign Affairs of the House made a favorable report on the resolution and no question appears to have been raised as to the constitutional authority of Congress to make the appropriation.<sup>2</sup> If such an appropriation were made and continued permanently, the effect would be to make the United States for all practical purposes a member of the court, since that appears to be the only legal obligation which membership in the court involves, and as for the right of the United States to make use of the court, it already has that right.

Precedents in support of the view that the United States might, consistently with the Constitution, become a member of the court through the

<sup>1</sup> In the vote of January, 1926, the minority was still smaller, the vote being 76 for adherence and 17 against.

<sup>2</sup> As to this resolution see Hudson, in this JOURNAL, Vol. 26 (1932), p. 794.

action of Congress in the form of an Act or a joint resolution instead of through the conclusion of a treaty, do not seem to be lacking. In fact, the United States has on various occasions become a member of international organizations by this procedure, for example, the International Hydrographic Bureau (1921), and the International Statistical Institute (1924). The latest and most important instance of the kind was afforded by the joint resolution of June 19, 1934, which authorized the President "to accept membership for the government of the United States of America in the International Labor Organization." An invitation was promptly extended by the Organization to the United States and it was accepted on August 20, 1934, through a letter addressed by the American Consul in Geneva to the Director of the International Labor Office.<sup>3</sup> It happens that the Senate voted unanimously for the resolution, but if it had been only by a bare majority that would have had no effect on the constitutional validity of the procedure by which the United States became a member.

It may be observed in passing that under the provisions of the constitution of the International Labor Organization (Part XIII of the Treaty of Versailles), by which the United States is now bound as a consequence of its acceptance of membership in the Organization, it will be obliged to submit to the compulsory jurisdiction of the Permanent Court of International Justice in certain cases and may be brought before the court at the instance of another member for failure to submit the draft conventions and recommendations of the International Labor Conference to the competent authority or authorities. Furthermore, the United States may be brought before the court on the charge of failure to comply with the terms of any international labor conventions to which it is a party. (See especially Articles 415, 417, 418 and 423.) It thus happens that while the Senate refused to give, by a two-thirds vote, its advice and consent to the resolution of adherence to the court protocols which would not have given the court any jurisdiction over the United States without its consent, it voted unanimously to make the United States a member of the International Labor Organization under which it will be subject to the compulsory jurisdiction of the court in certain cases.

It would seem beyond question that if it was competent for Congress by a joint resolution to make the United States a member of the International Labor Organization with the obligation which it carries of accepting the compulsory jurisdiction of the Permanent Court in certain cases, it is equally competent for Congress by the same procedure to make the United States a member of the court itself, when membership thereof would not involve the assumption of such an obligation. Acting on this view, Representative Lewis of Maryland introduced in the House of Representatives on January 24, 1935, a bill authorizing the President to adhere to the court protocols

<sup>3</sup> Hudson, "The United States in the International Labor Organization," this JOURNAL, Vol. 28 (1934), p. 671.

including the "optional clause" of the statute of the court. The same object could be accomplished by a joint resolution authorizing the President to accept membership in the court without adhering to the protocols, provided of course that procedure were acceptable to the signatories to the protocols. It has even been proposed that the United States might join the League of Nations by this procedure. On this assumption, Senator Pope of Idaho on May 7, 1935, introduced a joint resolution in the Senate authorizing the President to "notify the appropriate authority of the League of Nations that the United States accepts membership in the League," subject to certain terms and understandings. Under this procedure, ratification of the Covenant by the President by and with the advice and consent of two-thirds of the Senate would be dispensed with.

If the United States were to become a member of the court through the action of Congress instead of through the diplomatic process, the President would be competent without treaty authorization to designate consular or diplomatic representatives of the United States to sit in the Council and Assembly of the League for the purpose of participating in the election of judges of the court. In practice, he has often, without treaty authorization, designated American citizens to sit as representatives of the United States in international conferences convoked by or held under the auspices of the League, and even in the Council of the League itself. A recent example was the designation by the President of the American Minister to Switzerland, to participate with the Council of the League in the selection of the Central Opium Board. Another instance was the designation of the American Consul-General at Geneva to sit with the Council of the League in 1931 and to participate in its discussions relative to Japan's action in Manchuria, in so far as they involved the question of the obligations of the parties to the Briand-Kellogg Pact.

Earlier precedents in support of the view that membership of the United States in the League of Nations or the Permanent Court of International Justice might be constitutionally effected through the medium of an Act or resolution of Congress are by no means lacking. As is well known, when the treaty of April 12, 1844, for the annexation of Texas failed to receive the approval of the Senate by a two-thirds vote as required by the Constitution (the vote was 16 for ratification and 35 against ratification), further effort to obtain ratification was abandoned and the annexation was accomplished by means of a joint resolution passed on March 1, 1845, by a simple majority, the vote in the Senate being 27 for the resolution and 25 against it.<sup>4</sup> In this way the obstacle of a two-thirds vote in the Senate was avoided. That this was the object which the friends of annexation had in mind in resorting to the use of a joint resolution after the failure of the treaty, is clear from a communication of the Secretary of State, John C. Calhoun, to the United States *Chargé d'Affaires* in Texas, in which he said:

<sup>4</sup> 1 Moore, *Digest of International Law*, p. 454.

It is now admitted that what was sought to be effected by the Treaty submitted to the Senate, may be secured by a joint resolution of the two houses of Congress incorporating all its provisions. This mode of effecting it will have the advantage of requiring only a majority of the two houses, instead of two-thirds of the Senate.

A somewhat similar case was the annexation of Hawaii to the United States by a joint resolution of July 7, 1898, after it became evident that a treaty signed on June 16, 1897, for annexation would not receive the approval of two-thirds of the Senate. A certified copy of the resolution was delivered on the 12th of August, 1898, to the President of the Republic of Hawaii by the Minister of the United States, when the formalities of the transfer took place.<sup>5</sup> It happens that the resolution was voted for by two-thirds of the Senate, but if it had been otherwise (as it was in the case of Texas) the procedure by which Hawaii was annexed to the United States could hardly have been challenged on the ground of unconstitutionality.

In 1911, President Taft desiring to effect a reciprocity tariff arrangement between the United States and Canada, but being aware that a treaty for this purpose would not be approved by two-thirds of the Senate, reached an understanding with the Government of Canada by which the legislatures of both countries were to pass Acts providing for certain tariff reductions on goods imported into their respective countries from the other. The Congress of the United States passed such an Act but the proposed arrangement failed because the Canadian Parliament refused to pass a similar Act. Had it done so it would have afforded an example of an international arrangement effected by joint legislative action rather than by treaty, and the constitutional validity of the arrangement would have been beyond question.

As is well known, the President of the United States has often entered into trade or tariff reciprocity agreements with other countries in pursuance of authority conferred by acts of Congress, passed by a simple majority of both houses. Both Presidents McKinley and Theodore Roosevelt concluded a number of such agreements under authority of Section 3 of the Tariff Act of 1897. Their constitutional validity was upheld by the Supreme Court. *B. Altman and Company v. The United States*, 224 U. S. 583. Somewhat similar authority was conferred on the President by the Trade Agreements Act of June 12, 1934, and a number of trade agreements have been concluded with foreign countries in pursuance of the Act, while others are now in process of negotiation.

As is equally well known, Congress has conferred authority on the Postmaster-General to conclude postal conventions by and with the advice and consent of the President but without the necessity of ratification with the consent of two-thirds of the Senate. The constitutional competence of Congress to confer such authority on the Postmaster-General was upheld by

<sup>5</sup> 1 Moore, *op. cit.*, p. 510.

Solicitor General Taft in 1890. 19 Ops. Atty. Gen., p. 520. Probably no one today could be found who would challenge that competence.

Under authority of the Act of Congress of February 9, 1922, the World War Foreign Debt Commission concluded agreements with various foreign countries for the funding of their war debts to the United States. These agreements were approved by the President and Congress but were not subject to ratification by the President by and with the advice and consent of the Senate two-thirds of the Senators concurring. In some cases (*e.g.*, the agreement with Italy) the vote of the Senate was less than two-thirds, which would have been required had the agreements been in the form of treaties concluded by the treaty-making organs. But the constitutional validity of the agreements has not for this reason been contested.

Finally, it may be observed that the procedure of joint resolution was employed by the United States for declaring the termination of the war with Austria and Germany. Although in the past, international wars have almost invariably been terminated by the conclusion of a treaty of peace between the belligerent parties, in these cases it was done by Congressional action in the form of joint resolutions passed on July 2, 1921, declaring "that the state of war declared to exist" between the United States and Germany and between the United States and Austria on April 6 and December 7, 1917, respectively, "is hereby declared at an end." There was some opposition in Congress to the resolution by certain members who denied the constitutional competence of Congress to make peace by means of a resolution, but it was the view of the majority that since the state of war had been created by resolution of Congress, it could be terminated by the same authority and by the same procedure.<sup>6</sup>

The conclusion of the whole matter would seem to be that if it is within the constitutional competence of Congress by means of Acts or joint resolutions passed by a simple majority vote of both Houses and approved by the President, to make the United States a member of such institutions as the International Labor Organization, to annex foreign territory to the United States, terminate war with foreign countries, to authorize commissions to conclude foreign debt funding agreements, to authorize the Postmaster-General to conclude postal conventions and to empower the President to enter into trade and tariff agreements with foreign countries, it could certainly by either of these processes make the United States a member of the Permanent Court of International Justice and possibly also a member of the League of Nations. Indeed, it is believed, that Congress might with the approval of the President, create a relationship or undertake an engagement on behalf of the United States with a foreign state or states, in respect to any matter which is a proper subject of international regulation, or it might authorize the President to do so, provided it were within the constitutional

<sup>6</sup> See Anderson, "The United States Congressional Peace Resolution," this JOURNAL, Vol. 14 (1920), p. 384.

competence of the Congress to deal with such matter at all. The delegation by the Constitution to the President and the Senate of the power to make "treaties" does not exhaust the power of the United States over international relations. The will of the nation in this domain may be expressed through other acts than "treaties" and such acts do not necessarily need to be ratified by the President by and with the advice and consent of the Senate in order to be valid and binding, unless they so expressly provide by their own terms. In short, the power of the President and the Senate to regulate foreign relations is not an exclusive power; it is only when an agreement takes the form of a "treaty," as that term is used in the Constitution, that this power belongs exclusively to them. There is no inconsistency between the authority of the President and the Senate to regulate foreign relations through agreements in the form of "treaties" and the power of the President and Congress to deal with matters of foreign policy through legislative action. Which of the two procedures shall be employed in a given case is a matter of practical convenience or political expediency rather than of constitutional or international law. If the procedure of treaty regulation proves ineffective in a particular case because of the constitutional impediment relative to ratification, there is no reason of constitutional or international law why recourse to the easier alternative of legislative action cannot be had, if the President and a majority of the two Houses of Congress so desire, as has been done with success on various occasions in the past.

JAMES W. GARNER

#### DECLARATORY JUDGMENTS IN INTERNATIONAL LAW

In its decisions No. 7 and No. 13<sup>1</sup> and on other occasions<sup>2</sup> the Permanent Court of International Justice has asserted its power to render "purely declaratory judgments," that is, judgments between litigants which conclusively determine their rights but to which no coercive decree is appended. The Permanent Court affirmed in Judgment No. 7 that Article 63 of the Statute of the Court,<sup>3</sup> as well as Article 36 providing for obligatory jurisdiction for the determination of a question of law or fact,<sup>4</sup> contemplated judgments having a "purely declaratory effect." In Judgment No. 13 the court stated that Judgment No. 7, on the legal position of the German-owned factory at Chorzow, was "in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the parties; so that the legal position

<sup>1</sup> Series A. No. 7, p. 19; A. No. 13, p. 20.

<sup>2</sup> Series B. No. 11, p. 30.

<sup>3</sup> "Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify [them]; . . . the construction given by the judgment will be equally binding upon it."

<sup>4</sup> *I.e.*, jurisdiction over "the interpretation of a treaty" or "any question of international law" or "the existence of any fact which, if established, would constitute a breach of an international obligation."

thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."

In one sense it may be said that every decision of an international tribunal results in a judgment merely declaring the rights of the parties without coercive decree. International tribunals are not equipped with sheriffs to execute the judgment, and such judgments depend for their enforcement on the disposition of nations to carry them out. But it is interesting to note that very rarely indeed has a nation that has submitted to arbitration been so defiant of public opinion and the *mores* as to refuse to carry out an unfavorable award or judgment. The adjudication of a disputed boundary or title to land is nothing but a declaratory judgment, and both international tribunals and municipal courts like the United States Supreme Court have long exercised this function.

In theory, however, a judgment that A is under a duty to B to pay money or deliver property is regarded by some as not strictly declaratory. This is a matter of definition. But even assuming the validity of this view, there remains a large sphere of usefulness for judgments merely adjudicating and establishing the rights of contesting parties in types of cases not now common. It has heretofore been generally assumed even in private law that courts exist mainly for curative purposes to redress past grievances on the initiative of the complaining party. Insufficient attention has been given to the fact that courts have a vast preventive function to perform, namely, to adjudicate disputes before either party has acted on his own assumption as to his rights and broken the *status quo*. We are more accustomed to this phenomenon in international law than in private law, hence it ought not to be difficult to convince the statesmen of the world that the utility of adjudication can be greatly enhanced to the benefit of peace and legality generally by enabling a party normally the defendant to initiate an action for a declaration that he or it is not liable as charged. It should be recognized in international law, as it now is in private law since the enactment of declaratory judgments statutes, that a party erroneously charged has a legal interest in the adjudication of the issue raised and should be privileged to initiate the proceeding.

Such new use can also be made of the declaratory judgment, as in private law, to enable the party who claims the right to be released or to escape from a liability or obligation, to initiate an action against the accuser or promisee for a so-called "negative" declaratory judgment that the party plaintiff is not liable as charged, or a judgment that he is released by change of circumstances or conditions from the obligation once contracted.

The first of these cases has had several illustrations in recent years. One of the most striking is the charge made by Yugoslavia against Hungary that the latter was guilty of an international delinquency in harboring Yugoslav or other refugees who from Hungary plotted the assassination of King Alexander. This grave charge for a time threatened the most serious conse-

quences. Hungary disclaimed liability. Why should it not have been possible in theory for Hungary to institute an action before the Permanent Court of International Justice seeking a judgment on the facts and the law to the effect that it was not liable as charged? The Council of the League dealt with it as a political question, and encouraged the negotiations which removed the charge as an immediate potential basis of friction.

Mussolini has made against Ethiopia charges of violating the legal rights of Italy. The privilege of the party charged to convert the issue into an immediately legal one by instituting a judicial action for a judgment of non-liability might afford an opportunity to establish the truth of such charges instead of permitting them to fester into open conflict without any adjudication or of permitting an ostensible legal ground to be used as a cover for political designs. Any pause to the temptation of an aggrieved state to become plaintiff, judge and sheriff in its own cause ought to be a source of gratification.

In theory again, it might have prevented the current deterioration of European political relations had Austria been privileged in 1931 to initiate the proceeding against France and Italy prior to the actual conclusion of the proposed Customs Union with Germany, but on submission of the draft and the announced intention to conclude it, seeking a declaration from the Permanent Court that under the Treaty of St. Germain and the 1922 Geneva Protocol, Austria was privileged to enter into the contested Customs Union without violating those treaties. Had the issue been raised before the *fait accompli*, the atmosphere for a strictly judicial opinion would have been improved; but in any event, it might have prevented that panic which ultimately had such damaging psychological effects on the pacification of Europe and perhaps from the start foredoomed to failure the Conference on the Limitation of Armaments. As Congressman Gilbert of Kentucky said in 1928 with reference to the then pending Federal Declaratory Judgments Bill: "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgments law you turn on the light and then take the step."

The other and equally necessary adjunct to existing forms of international procedure is to enable a party to a treaty or a promisor of an international obligation who claims that time and circumstance justify release from the obligation to initiate the proceeding for a judicial declaration of release. In Anglo-American law we are accustomed to this proceeding in many aspects, for example, on the part of a covenantor in a building or other land restriction extending over a long period who claims that the obligation has been extinguished, but instead of first departing from the covenant and risking damages and forfeiture, sues first for an adjudication of the current invalidity of the old restriction. If a favorable judgment is given, he has the certainty that he is no longer bound and is privileged to proceed accordingly.<sup>5</sup> So

<sup>5</sup> See *Hess v. Country Club Park*, 213 Cal. 613, 2 Pac. (2d) 782 (1931); *Great Britain, Law*

debtors may sue creditors for a declaration that they do not owe the amount claimed or that for some other reason they are released in whole or in part from the ostensible obligation. The necessity for such judicial relief is even more insistent in international than in private law. For whereas in private law legislatures are enabled to alter the law, the parties to treaties do not usually provide means for revision or the machinery for determining when a treaty should be terminated. The doctrine of *pacta sunt servanda* is often abused to give a supposed moral sanction to treaties, imposed under political duress, which every party to the treaty is well aware will not be observed beyond the time when the force which imposed it is lifted or diverted. The very difficulty of applying the doctrine of *rebus sic stantibus* makes it the more important to provide for nations that do not necessarily wish to be lawless a judicial method for determining when they are released from a treaty, the obsolescence of which may be disputed by the parties and which a party charged is thus constrained either to observe under duress or protest, or else to break and risk all the political consequences. International law, primitive and inadequate as it is in many respects to deal with the acute problems which agitate this hard world should, with the establishment of international tribunals, have reached sufficient maturity to enable a promisor who claims the legal right to be released from his obligation to have the opportunity of invoking a judicial decision and thus making unnecessary the political recourse which is now frequently his only remedy by reason of the want of a legal alternative. It is the duty of statesmanship to supply opportunities for adjudication and thereby remove the temptation to political and unilateral recourse with all its attendant risks and dangers. Such opportunity would make it less necessary to invoke the doctrine of necessity which, while hardly dismissible in such an immature system of law as the international, nevertheless awakens emotional currents dangerous to a legal order.

Treaties relating to territorial matters are often founded upon assumptions as to the state of physical or geographical facts and conditions. Maps have occasionally proved misleading, physical landmarks were often wrongly assumed to be in particular territory. When later it is discovered that the assumption involved substantial error of an essential kind, theory and practice both admit the voidability of the treaty at the hands of the party prejudiced. It is said that the minds have not met, that there is a *vice du consentement*. Instead of remitting either party to the dangerous expedient of denouncing the treaty on the unilateral conclusion of error or of its essential or vital character, a matter of degree on which opinions may justifiably differ, the opportunity for judicial recourse by way of declaratory judgment might avoid the necessity or temptation to resort to such precarious expedient.

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of Property Act, 1925, 15 Geo. V, C. 20, sec. 84; and Borchard, Declaratory Judgments (Cleveland, 1934), pp. 325-329.

Treaties often involve reciprocal obligations, and the question has arisen whether the alleged breach by one party of one or more stipulations of the treaty justifies the other party in repudiating or claiming relief from the reciprocal obligations of the treaty, in whole or in part. The other party or parties to the treaty before proceeding on the supposition that the act proposed or consummated constitutes in reality a breach and discharges them from the performance of further obligations under the treaty, should have the privilege of seeking a judicial declaration as to the legal effect of the disputed act and of its consequences in discharging the petitioning state from further obligations under the treaty, or otherwise. During the European War of 1914 many English firms found it important to obtain a judicial construction of their long-term contracts with German firms to determine whether the war had terminated the contracts and released them entirely from, or merely suspended during the period of the war, obligations which would have to be resumed in normal course when the war was over.<sup>6</sup> Upon the answer to the question of construction propounded depended the plans of the plaintiffs for the conduct of their post-war business, and it was important that they be not left in suspense but know with authoritative accuracy their legal position toward the German defendants.

In a rapidly changing world new developments of all kinds have effect on treaties bilateral and multilateral, the exact scope, nature and legal consequences of which it is difficult to establish and which at all events it is unwise to endeavor unilaterally to determine. It should be possible in all such cases for any of the parties placed in doubt, difficulty or jeopardy by such a possibly operative fact, to obtain the assurance against all other interested parties of a judicial declaration substituting certainty for uncertainty and clarity for doubt and jeopardy. We shall thus enlarge the scope of legal control and proportionately narrow the area of political action.

EDWIN M. BORCHARD

#### THE CONFLICT OF LAWS RESTATEMENT

The publication in January, 1935, of the completed Restatement of the Law of Conflict of Laws by the American Law Institute was an event of great importance in the development of private international law. It relates to conflicts of law not only between the states of the Union, but also between the law of foreign countries and the local law in an issue pending before a State or Federal court.

The Restatement was adopted and promulgated in its present form at the meeting of the American Law Institute in Washington on May 11, 1934, but its publication was deferred for necessary editorial changes and for adapta-

<sup>6</sup> *Ertel Bieber & Co. v. Rio Tinto Co.* (C. A.) [1918] A. C. 260; *Zinc Corp. v. Hersch* (C. A.) [1916] 1 K. B. 541; *Hugh Stevenson & Sons v. Akt. für Cartonnagen-Industrie* (H. L.) [1918] A. C. 239. Borchard, *op. cit.*, 319

tion of the comment and illustrations to the text. The Institute was organized in 1923 upon the invitation of a voluntary committee of which Mr. Elihu Root was chairman, for the establishment of a permanent organization for the improvement of the law. Conflict of Laws was one of the three subjects to be taken up in the first year of the establishment of the Institute, so that eleven years of drafting and discussion were spent by the reporter, the advisers, the members of the Institute and by the Bar generally, before the Restatement was finally accepted. Professor Joseph H. Beale, of Harvard University, acted as general reporter. Dean Herbert F. Goodrich, of University of Pennsylvania, and Professor Austin W. Scott, of Harvard University, were special advisers at various stages of the work, and Dean Goodrich acted as reporter for the chapter on Administration.

The Restatement has for its object an orderly system of the general common law of the United States relating to this subject, including not only the law developed through judicial decision but also as the result of application by the courts of statutes that have been generally enacted and in force for many years. It is not intended that the Restatement should be enacted into law anywhere. There was an ever increasing volume of decisions of the State and Federal courts, many of which showed irreconcilable differences of principle in solving conflicts of law between two states, or between a state and a foreign country. Some step was essential in the direction of promoting certainty and clarity in this field. Differences in principle for applying one system of the law rather than another are particularly unfortunate. Such differences permit a litigant to deliberately change the system of law to be applied by selecting a favorable forum. Differences between the substantive law of any two of our states, or *a fortiori*, between a state and a foreign country, are to be assumed. It is precisely such differences which make necessary a science of private international law. But discordance in the very principles which are designed to *solve* such conflicts is a negation of the science viewed as an international or universal system.

During the past half century, an earnest attempt has been made to eliminate conflicts of law between the various states of the Union through the work of the official Commissioners on Uniform State Laws. Draft statutes have been elaborated upon more than fifty subjects for uniform enactment by the states. Unfortunately, the legislatures of the states have been too slow in acting upon these statutes. The ideal of unanimity has never been achieved except with regard to the Negotiable Instruments Law, the Warehouse Receipts Law, and, to a less extent, the Sales Law. A considerable number of states have adopted the drafts on other subjects, but this movement is only palliative because incomplete. The achievement of the American Law Institute in completing a Restatement for the entire field of conflict is an event of first-rate importance. It recognizes differences, and endeavors to select the system applicable by the statement of principles upon which all jurisdictions may unite.

Instruction in the character of the problems involved in the conflict of laws has been far from universal in our law schools. The Director of the Institute, Dr. William Draper Lewis, points out in his introduction to the Restatement, "There has been no such general long-continued critical study of the subject as has been given to contracts, property and the other principal subjects of the common law." As a result of this neglect and possibly also because of the difficulty of adequately proving the foreign law which might have been applicable to the issue, the courts have not developed a jurisprudence that could be traced back in an unbroken line to accepted sources as in the case of other branches of law.

The Restatement consists of twelve chapters. Three of them are general subjects: Domicile, Jurisdiction in General and Jurisdiction of the Courts. Five chapters are upon specific subjects: Status, Corporations, Property, Contracts and Wrongs. Three final chapters relate to Application of Judgments, Administration of Estates and Procedure. The entire Restatement comprises 625 sections, with comment and illustration after nearly all, but without documentation or reference to decided cases. Annotations will be prepared for the various State and Federal jurisdictions showing how far the Restatement is in concurrence with the decisions and statutes of the particular jurisdiction and how far it modifies the principles established by such decisions and statutes. Some courts have already shown a desire to accept the principles established by the various restatements. Only by general acceptance will they have more than academic significance. A considerable number of decisions of the highest courts of the states have already referred to and adopted certain sections of the Restatement as authoritative statements of the common law of their respective jurisdictions. Over one hundred references to acceptances of sections of the Restatement by various State and Federal courts have been collated by the Institute down to February, 1935.<sup>1</sup>

While this evidences a sincere desire to make the Restatement effective by adoption into the body of our laws, it is recognized that upon some subjects the diversity of principle is so acute that acceptance of the Restatement by all jurisdictions is scarcely to be expected. Accordingly it has been proposed that consideration be given (1) to existing statutes and the sections of the Restatement with regard to jurisdiction for divorce and recognition of divorce from other states; (2) to possible legislation with regard to decedent's estates so as to insure equal treatment for foreign creditors who present their claims at the domicile of the decedent; (3) to the Statute of Frauds; (4) to the possibility of legislation to avoid the extreme confusion of authority on the rule of contracts in the Conflict of Laws.

While we cannot here undertake a critical examination of the provisions of the Restatement, it is of importance to mention that it rejects the principle of comity in the sense that reciprocity governs the action of a court of one

<sup>1</sup> The Restatement in the Courts, 2nd ed., February, 1935, pp. 63-110.

state with regard to the enforcement of a right created in a foreign state. The rule of reciprocity was accepted for Federal jurisdictions in *Hilton v. Guyot*.<sup>2</sup> But this the Restatement definitely rejected, just as it had already been rejected by the highest courts of some of our states.<sup>3</sup> The Restatement accepted the principle (§6) that: "The rules of Conflict of Laws of a state are not affected by the attitude of another state toward rights or other interests created in the former state." Thus, the comity of nations, though often spoken of as the basis for the application of foreign law, is not accepted by the Restatement so as to make reciprocity of treatment necessary for the application of the law of a foreign state.

The nations of Europe have been endeavoring to arrive at a unification of principles in the field of private international law by means of treaties elaborated at conferences held at the Hague from time to time since 1899. They have not been very successful, not only because of the inherent complexity of the problems, but also because of political difficulties. The greatest success achieved was perhaps in relation to the conflict of laws in the field of negotiable instruments. Conventions designed to unify the laws of bills of exchange and promissory notes were signed at Geneva, June 7, 1930, and on checks, March 19, 1931. At the same time, special conventions were signed by some 26 nations, accepting the principles of the conflict of laws to be applied within these specific fields. One would at first be inclined to believe that a uniform law is in itself designed to eliminate conflicts of law, but the conventions left considerable margin to be dealt with by domestic legislation. The same is also true of our own Negotiable Instruments Law.

The completion of the Restatement affords an opportunity to contrast the methods of procedure of the Old and the New World. The nations of Europe seek to establish positive law for solving conflicts through multilateral treaties covering specific fields. In the United States, unification by positive law has been supplanted by a restatement in terms of principles which, because of their inherent reasonableness and the weight of authority given them by the practitioners and the teachers of law throughout the country, are likely to gain acceptance and application by the courts. Perhaps this contrast of method is characteristic of the genius of the peoples who have adopted the respective methods. It also conforms to differences of historic tradition between the English common law and the Roman law.

ARTHUR K. KUHN

#### THE GROWTH OF THE LAW

When the officers of the French steamship *Lotus* and of the Turkish steamship *Boz-Kourt* negligently failed to avert a collision between their two vessels on the high seas, they set in motion a series of international forces of which they could have had no knowledge or anticipation.

<sup>2</sup> (1895), 159 U. S. 113.

<sup>3</sup> *Johnston v. Compagnie Générale Trans-Atlantique* (1926), 242 N. Y. 381.

The immediate consequences of the collision are well known. When the *Lotus* put into Constantinople, Lieutenant Demons was arrested and brought to trial by the Turkish authorities. The French Government insisted that the Turkish Government had no jurisdiction over Lieutenant Demons in the premises. By agreement, the two governments referred the matter to the Permanent Court of International Justice. The question put to the court under this agreement read as follows:

(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers?

This question the court by a majority of six to five answered in the negative.

The decision was an interesting one and among the first in which the court had to deal broadly with the foundations of international law. The case has been the subject of much comment as appears from the bibliography listed in Hudson's *World Court Reports*, Volume II, page 20.

It might be supposed that this judicial decision of the highest judicial tribunal would put an end to the case. From its general international aspects, however, this is not true.

In January, 1929, a communication from the International Association of Mercantile Marine Officers was considered by the League of Nations Advisory and Technical Committee for Communications and Transit. The Association expressed its concern regarding the decision of the court, saying that it was especially anxious that measures should be taken to prevent a master suspected of being at fault from being proceeded against both by the state whose flag the vessel was flying and the state where the vessel put in.<sup>1</sup> The Advisory and Technical Committee referred the communication to its Permanent Committee on Ports and Maritime Navigation. This committee reported that it could not recommend for consideration by the Committee for Communications and Transit the question of the penal consequences of collisions at sea, with a view to the preparation of an international agreement, since this project would appear to fall within the sphere of international criminal law. The Advisory and Technical Committee at its meeting March 15 to 18, 1929, accordingly referred the matter to the Bureau of the International Labour Office.<sup>2</sup>

<sup>1</sup> League of Nations: Advisory and Technical Committee for Communications and Transit, Minutes of the Thirteenth Session, March 15th to 23rd, 1929. VIII. Transit. 1929. VIII. 7. p. 19.

<sup>2</sup> *Ibid.*, p. 21.

The Governing Body of the International Labour Office had in February, 1928, already received a communication direct from the International Association of Mercantile Marine Officers and it considered the matter at its 38th Session in the same month. The only result of its discussion had been a reference of the matter to the Joint Maritime Commission. The Eighth Session of that commission, meeting in Geneva in March, 1928, had proposed that the question of the establishment by each maritime country of the minimum of professional competency exigible from captains, etc., in charge of watches on board merchant ships (one of the questions raised by the communication of the International Mercantile Marine Officers' Association) be placed on the agenda of the International Maritime Conference in 1929.<sup>3</sup> This proposal was adopted by the Governing Body of the International Labour Office at its Forty-Second Session, in October, 1928.<sup>4</sup>

The Ninth Session of the Joint Maritime Commission of the International Labour Office, meeting in Paris in April, 1929, noted with regret that no progress had been made in finding an international solution for the problem and adopted the following resolution:

The Joint Maritime Commission, considering that it is necessary to lay down by means of an international Convention the competent courts and the penalties to be imposed in case of collision at sea,

Considering that the question, which was referred successively to the Advisory and Technical Committee on Communications and Transit and the Permanent Committee on Ports and Maritime Navigation, appears to have been set aside rather than solved by those bodies,

Reaffirming the serious reasons which led it to ask for a solution as an urgent matter, especially as regards the danger that ships' masters and shipowners may be liable to more than one prosecution for the same offence,

Expresses the wish that the International Maritime Committee of Antwerp, which has already successfully undertaken the drafting of a number of international conventions of a legal character, should deal with the settlement of the penal consequences of collisions outside territorial waters, and should place this question on the agenda of the next meeting, with a view to the preparation, in concert with the International Labour Office, of an international agreement containing provisions which would complete, by means of rules concerning penal sanctions, the Convention at present in force on collisions and assistance at sea.<sup>5</sup>

This resolution was approved by the Governing Body in September, 1929.<sup>6</sup>

In response to these requests, the International Maritime Committee addressed itself to the problem. Observing its usual practice, it sent out a questionnaire to the various national committees, asking them for information regarding the status of their national laws on the following questions:

1. What does your law provide as to punishment and jurisdiction when a collision on the high seas involves loss of life or personal injury?

<sup>3</sup> International Labour Office: Official Bulletin, Vol. XIII, p. 67.

<sup>4</sup> *Ibid.*, p. 143.

<sup>5</sup> *Ibid.*, Vol. XIV, p. 56.

<sup>6</sup> *Ibid.*, p. 43.

Are there any sanctions provided by penal law? Have the national courts jurisdiction in such matters, and under what conditions? More especially:

- (a) have they power to punish such offences when the person injured is a foreigner?
  - (b) when the offences are committed by a foreigner and the sufferer is a national subject?
2. What solutions of an international character do you suggest? Especially:
- (a) Should penal sanctions be provided for a collision involving loss of life or personal injury on the high seas?
  - (b) Should punishment of such offences be ensured whatever be the nationality of the offenders or sufferers; if some distinctions ought to be made, what should they be?
  - (c) To which courts should jurisdiction be granted for punishing such offences?
  - (d) Should such jurisdiction be confined to the courts of the locality of which the ship is flying the flag, or to the courts of the country to which the offender is amenable? In this latter case, shall such jurisdiction be determined by the domicile or by the nationality of the offender?<sup>7</sup>

The responses indicated that there was considerable divergence in existing national legislation. The matter was studied at the Antwerp Conference in 1930 and at the Conference at Oslo in 1933. A resolution of the Antwerp Conference had expressed the opinion that it is desirable to regulate, by way of international convention, the question of penal jurisdiction and competence in matters arising out of collisions at sea, and entrusted the Permanent Bureau with the task of appointing a committee to prepare a draft convention to be submitted to the next conference.<sup>8</sup> The Conference at Oslo found itself unable to agree on the draft convention which had been prepared, and adopted the following resolution:

This Conference records its unanimous approval of the principle that in cases of a collision upon the high seas no criminal or disciplinary proceedings arising out of such collision should be permissible against the captain or any other person in the service of the ship except in the ports of the State of which the captain or such other is a national or of which his ship was flying the flag at the moment of collision, this being the principle expressed in Article 1 of the draft Convention laid before the Conference:

Before making any further pronouncement, the conference instructs the Sub-Committee to make a report to the Comité Maritime International upon the various matters raised in discussion during the debate and in particular to take account of the desires expressed by several members to the effect that the whole responsibility for criminal and disciplinary action should in all cases of collision be left to the country

<sup>7</sup> International Maritime Committee, Bulletin No. 90, Antwerp Conference 1930, IV Synoptical Table.

<sup>8</sup> See International Maritime Committee, Report of Proceedings of Antwerp Conference, August, 1930, p. 484.

of which the captain or such other persons in the service of the ship is a national or of which the ship was flying the flag at the moment of collision;

The Conference is further of the opinion that the Sub-Committee should in this investigation obtain the considered views of the competent authorities and organizations interested in the subject and particularly of the organizations representing officers of the mercantile marine.<sup>9</sup>

We have here an international example of a process frequently found in the national field. A decision of a high tribunal in applying the existing law does not give satisfaction to the practical needs or desires of a business or professional group. That group then seeks to influence the parliament or legislature to enact a law which will provide for the future a rule different from that applied by the court. In the international field, the process is more difficult since there is no legislature to which such a proposal can be addressed. Nevertheless, the whole history of the International Maritime Committee and of the International Law Association shows that these bodies are almost as efficient as a committee of Congress in framing "legislation" and in seeking its adoption. In the international field, "legislation" usually takes the form of a multipartite convention, although in maritime matters it has at times been found useful to meet the problem by voluntary uniform adoption of a standard set of rules such as the York-Antwerp rules on general average.

With the growth of international executive and administrative machinery such as that found in the League of Nations and the International Labour Organization, as well as in various international unions, supplemented by a permanent judiciary and the quasi-legislative international conference, international law has increasing facilities for healthy development.

PHILIP C. JESSUP

<sup>9</sup> See International Maritime Committee, Bulletin 96, Oslo Conference, p. 477.

## CURRENT NOTES

### THE ANNUAL MEETING OF THE SOCIETY

The American Society of International Law convened in its Twenty-Ninth Annual Meeting at Washington on April 25 and adjourned on April 27 after a discussion of the subject of neutrality both generally and in several of its more important aspects.

In a presidential address which opened the meeting on Friday evening, April 25, Dr. James Brown Scott, who was Chairman of the United States Neutrality Board from 1914 to 1917, in a paper entitled "The Neutrality of the Good Neighbor," proposed government control of the manufacture of arms and munitions of war, the prohibition of the exportation of such materials to belligerents, and the shipment of other articles to belligerents at the risk of the shippers. Mr. Fred K. Nielsen, former Solicitor of the Department of State, followed Dr. Scott with an address on the subject of "The Future of Belligerent Rights on the Sea." Mr. Nielsen did not favor proposals that neutrals should renounce their rights, but insisted rather that the rights conceded to belligerents should be abridged.

On Friday morning, April 26, the meeting opened with a paper by Josef L. Kunz, Professor of International Law at the University of Toledo, on the subject of "The Covenant of the League of Nations and Neutrality," in which Professor Kunz pointed out the instances in which the Covenant leaves room for members to remain neutral. He was followed by Edwin D. Dickinson, Professor of Law at the University of California, who discussed "Neutrality and the Munitions Traffic," in which he advocated further development in the prohibition of trade with belligerents starting from the existing ban on private trade in ships of war.

In the afternoon of Friday, April 26, the leading address was made by Mr. Lester H. Woolsey, former Solicitor of the Department of State, who, from his experience in that official position during the World War, discussed important phases of the subject of "Neutral Persons and Property on the High Seas in Time of War." Mr. Woolsey drew a distinction between neutral rights and neutral duties and suggested several ways in which so-called neutral rights might be modified so as to reduce the friction which always arises between neutrals and belligerents.

The evening session of Friday, April 26, was opened with an address by John Dickinson, Assistant Secretary of Commerce, on the subject of "Neutrality and Commerce." Mr. Dickinson called attention to previous attempts to preserve neutrality by limiting or stopping commerce with belligerents and pointed out the disastrous effects which react upon the neutral in such attempts. Honorable Henry L. Stimson, former Secretary of State, delivered a forceful address on the subject of "Neutrality and War Prevention," in which he emphasized that it is more important for governments to

devote their energies to the prevention of war than to the devising of means to remain neutral after war breaks out.

Each of the formal addresses and papers, all of which were provocative in their contents and suggestions, was followed by an extended discussion under the leadership of competent members selected in advance. The general discussion of neutrality at the opening session of the Society on Thursday evening was led by Mr. Frederic R. Coudert, of the New York Bar, Professor Edwin M. Borchard, of Yale Law School, and Professor Charles G. Fenwick, of Bryn Mawr College.

The discussion on "The Covenant of the League of Nations and Neutrality" on Friday morning was led by Professor Manley O. Hudson, of the Harvard Law School, and that on "Neutrality and the Munitions Traffic" was led by President William C. Dennis, of Earlham College, Mr. Francis Colt de Wolf, of the Department of State, Mr. Arthur K. Kuhn, of the New York Bar, and Dr. Georg Wunderlich, of Berlin, Germany. Mr. Woolsey's proposals in regard to "Neutral Persons and Property on the High Seas in Time of War," made at the afternoon session of the 26th, were discussed by Professor Herbert W. Briggs, of Cornell University, Professor Llewellyn Pfankuchen, of the University of Wisconsin, and Honorable Jackson H. Ralston, of Palo Alto, California.

Honorable John Dickinson's paper on "Neutrality and Commerce" was discussed under the leadership of Professor Phillips Bradley, of Amherst College, and the discussion of Mr. Stimson's address on "Neutrality and War Prevention" was led by Professor Clyde Eagleton, of New York University, Professor Charles Fairman, of Williams College, and Professor John B. Whitton, of Princeton University.

The business of the Society was transacted on Saturday morning, April 27. Sir John Fischer Williams, of England, was elected an honorary member. All the officers of the Society were reelected for the ensuing year. The following members were elected to the Executive Council to serve until 1938 in succession to the class whose term of office expired in 1935: Eleanor Wyllys Allen, of the Bureau of International Research of Harvard University and Radcliffe College; Edwin M. Borchard, Professor of Law, Yale Law School; Francis Deák, Professor of Law, Columbia University; Honorable John Dickinson, Assistant Secretary of Commerce; Clyde Eagleton, Professor of Government, New York University; Ellery C. Stowell, Professor of International Law, American University; Elbert D. Thomas, United States Senator from Utah; Amry Vandenbosch, Professor of Political Science, University of Kentucky.

The annual banquet with which the meeting closed on Saturday evening, was attended by two hundred members and their guests and was presided over by the President, Dr. James Brown Scott. The speakers were His Excellency Hiroshi Saito, Japanese Ambassador, His Excellency Oswaldo Aranha, Brazilian Ambassador, Senator Gerald P. Nye, Chairman of the

Senate Special Committee Investigating the Munitions Industry, and Honorable Robert Lincoln O'Brien, Chairman of the United States Tariff Commission. The Japanese Ambassador in his address paid tribute to Henry Willard Denison, an American for many years in the service of the Japanese Foreign Office. Senator Nye told of some of the international aspects of the munitions traffic in the light of the evidence produced before the Senate committee, and Mr. O'Brien concluded the evening's exercises with a very humorous address on the effects of propaganda.

The printed proceedings of the meeting this year form an interesting symposium of views on the subject of neutrality, which should be especially valuable to teachers and students, foreign office officials and other members of government interested in the development of the law of neutrality and its possible application in future wars. As usual, the full text of all the papers and addresses, with a verbatim report of the discussions had thereon, will appear in the printed volume, which will be ready for members and subscribers in July. Inquiries in regard to the volume may be addressed to the undersigned Secretary of the Society.

GEORGE A. FINCH

#### KIDNAPING OF FUGITIVES FROM JUSTICE ON FOREIGN TERRITORY

Since the establishment of the National Socialist régime, several protests have been addressed by foreign states to the German Government in which it is charged that individuals have been abducted or decoyed from their territories and held for trial in Germany. The recent agreement of the Governments of Switzerland and Germany to submit to arbitration the case of Herr Berthold Jacob-Salomon, who is alleged to have been kidnaped by German agents on Swiss territory, will lead to the first authoritative statement by an international tribunal of the legal principles governing the subject. Numerous incidents which present similarities or analogies to this case have in the past been the object of diplomatic negotiation or action by national courts. The precedents, however, are conflicting, and the value of the legal principles which have been laid down is greatly reduced by the general tendency on the part of the courts to equate the international obligations of their respective states with the rules of their own national law.<sup>1</sup>

Excessive reliance upon the case of *Ker v. Illinois* (1886), 119 U. S. 436, has been productive of much confusion of thought. In this case a fugitive from justice, who had been convicted of larceny in Illinois, was seized by force in Peru and brought to the United States by an American agent who had been authorized to receive him upon extradition, but had failed to present the necessary papers to the Peruvian authorities. The Supreme Court held that Ker had failed to establish the existence of any right under the constitution, laws or treaties of the United States which had been denied as a result of his irregular arrest, and that, as an individual, he possessed no right of asylum in Peru. *Ker v. Illinois* is merely authority for the proposition that an individual is not competent to resist trial in a court of the United States by reason of his forcible seizure in another country. It does not imply that kidnaping, under such circumstances as the above, will not give rise to an international obligation

The intervention of political factors and considerations of comity often obscures the legal basis of the action taken.

According to the Swiss version of the case,<sup>2</sup> Herr Jacob-Salomon, an ex-German political *émigré*,<sup>3</sup> on March 9, 1935, came to Basel upon the invitation of one Dr. Hans Wesemann, a German national, who had gained his confidence through taking some of his articles for the English journals. At Basel, Jacob met Wesemann and another German national, who induced him to enter an automobile with them for the ostensible purpose of driving to the home of the latter at Riehen, Switzerland. As they approached the frontier at Petit-Huningue, the chauffeur, disregarding the order of the Swiss customs guards to stop, accelerated his speed to seventy kilometers per hour and dashed over the line into German territory. The barriers on the German side were open, although they were customarily closed before the hour (8:50 p.m.) at which the car crossed. Two hundred meters beyond the frontier, Jacob was arrested by German functionaries who had been awaiting his arrival. Wesemann returned to Basel on the same night and was later arrested on a charge of kidnaping. The Swiss Government, it is claimed, has evidence that "the abductors acted with the connivance of official German agencies," the German Secret State Police having been informed on the previous day of the plan to kidnap Jacob.<sup>4</sup> "In these circumstances," the note of April 1 states, "the Swiss Government is of the opinion that the abduction of Jacob across the frontier, carried out with the coöperation of German authorities, constitutes a grave violation of Swiss sovereignty, against which it protests." The Swiss Government, therefore, demanded the immediate return of Jacob, the punishment of the guilty functionaries, and the taking of steps necessary to prevent the recurrence of like incidents.

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on the part of the United States to restore the fugitive; it implies only that the Supreme Court is not competent under the law of the United States to give effect to such an obligation, should it be shown to exist.

In a case arising between Mexico and the United States in 1906, however, the State Department cited *Ker v. Illinois* in support of its refusal to release a Mexican national who had been induced by fraud to enter American territory, where he was placed under arrest. Foreign Relations, 1906, II, 1121-1122. It is obvious that an appeal to a national judicial decision, which explicitly left undetermined the points of international law involved in the case, begs the question, and is equivalent to invoking the provisions of municipal law as an answer to demands for the fulfillment of international obligations.

<sup>2</sup> Note of the Federal Council to the German Foreign Office, April 1, 1935. Text in *Journal de Genève*, April 3, 1935; summary in N. Y. Times, April 3, 1935.

<sup>3</sup> Jacob had been denationalized under the law of July 14, 1933 (*Reichsgesetzblatt*, I, 480), which provides that "Nationals of the Reich who reside abroad may be deprived of German nationality if they have by their conduct, contrary to the duty of fidelity to the Reich and the people, injured German interests." See Preuss, "International Law and Deprivation of Nationality," 23 *Georgetown Law Journal* (1935), 250 ff.

<sup>4</sup> In a note of April 27, the Swiss Government charged that Dr. Walter Richter, who had conspired with Wesemann to entice Jacob to Basel, was actually a member of the *Gestapo*. *Journal de Genève*, April 30, 1935.

Having refused to release Jacob, the German Government, in a statement issued on April 15,<sup>5</sup> justified its position on the ground that "no evidence has been found that German official authorities participated either directly or indirectly in the events on Swiss territory. . . . Inasmuch as Jacob-Salomon has come within reach of German jurisdiction without intervention of official German authorities, and inasmuch as he is a traitor to the State of the worst sort . . . there is nothing to be done except permit the criminal procedure pending against him for a long time to take its course." It stated further that the motives from which Wesemann and his accomplices acted "cannot be judged with any certainty in Germany," and that Wesemann is "a person with a doubtful past," engaged in anti-German propaganda. He may have surrendered Jacob to the German authorities on account of disapproval of his treacherous methods.<sup>6</sup> In a note of April 27,<sup>7</sup> the Swiss Government reaffirmed its position and requested arbitration of the dispute under the Treaty of Arbitration and Conciliation of December 3, 1921,<sup>8</sup> a proposal accepted by the German Government on May 6.<sup>9</sup> The treaty provides (Articles 1, 2) for the compulsory arbitration of all legal disputes which it has not been possible to settle within a reasonable time by diplomatic means.<sup>10</sup> The tribunal consists of five arbiters drawn from the members of the Permanent Court of Arbitration, each party choosing one, and both designating jointly three additional arbiters, one of whom shall be umpire (Article 6). In the event of failure to establish the *compromis* or to constitute the tribunal within two months, either party may submit the case to the Permanent Court of International Justice.<sup>11</sup>

The facts appear to be much more clear in the recent kidnaping of Herr Lampersberger, a German political refugee, from Czechoslovakian territory. While waiting on the railway platform of the frontier station at Eisenstein, Lampersberger was attacked by four armed men who descended from a train which had drawn in from Germany. Beating him into unconsciousness, Lampersberger's abductors dragged him across the frontier under the protection of the drawn revolver of a Bavarian gendarme, who had crossed the line in order to cover their retreat.<sup>12</sup> On May 9, 1935, the Czechoslovakian Government demanded the immediate release of Lampersberger and the punishment of the offending gendarme.<sup>13</sup>

<sup>5</sup> N. Y. Times, April 16, 1935. The statement summarizes a note delivered to the Swiss Minister at Berlin on April 13.

<sup>6</sup> Wesemann is sought as a National Socialist *agent provocateur* by the police of Denmark, Belgium and France. See the *Journal de Genève*, March 27, 29, 30, 1935, and the N. Y. Times, April 5, 1935.

<sup>7</sup> *Journal de Genève*, April 30, 1935.

<sup>8</sup> 12 League of Nations Treaty Series, No. 320, p. 281.

<sup>9</sup> N. Y. Times, May 7, 1935; *Völkischer Beobachter*, May 7, 1935.

<sup>10</sup> Disputes as to whether a case is justiciable are referred to arbitration. Art. 2.

<sup>11</sup> Art. 2, Protocol of Aug. 29, 1923, 88 League of Nations Treaty Series, p. 285.

<sup>12</sup> N. Y. Times, April 30, 1935.

<sup>13</sup> *Ibid.*, May 9, 1935.

Another recent case of political kidnaping is that of Herr Gutzeit, a German national, who

The records of state practice and the literature of international law afford little guidance in the solution of the legal problems growing out of such cases as the above. The clearest case of state responsibility for the kidnaping of fugitives is found where state agents have seized the individual by violence upon the territory of the state of asylum. Such a violation of foreign territory undoubtedly engages the responsibility of the state of arrest, which is under a clear duty to restore the prisoner and to punish or extradite the offending officers.<sup>14</sup> This obligation appears to have been almost uniformly acknowledged in cases where the injured state has made a diplomatic reclamation.<sup>15</sup> In 1841 the British Government ordered the return to the

was abducted on Dutch soil, February 4, 1935, and carried to German territory, where he was placed under arrest. *N. Y. Times*, May 2, 1935. Upon the protest of the Dutch Government, Herr Gutzeit was conducted to the frontier by the German police. He refused, however, to avail himself of his freedom, showing a strange predilection for a German prison which may be explained by the fact that his wife and children are still in Germany. A Dutch accomplice in the kidnaping is held for trial before the Dutch courts. *Ibid.*, May 20, 1935.

In a similar case, a group of Austrian National Socialists induced one of their number, whom they suspected of disloyalty, to enter German territory, where he was seized by members of the Austrian Legion and confined in the concentration camp at Dachau. He subsequently made his escape to Austria, where he brought charges against his former associates for kidnaping. *Ibid.*, April 6, 1935. On the responsibility of the German state for the acts of agencies of the *N.S.D.A.P.* (including the Austrian Legion), see Preuss, "International Responsibility for Hostile Propaganda against Foreign States," this *JOURNAL*, Vol. 28 (1934), p. 664 ff.

<sup>14</sup> Travers, *Le droit pénal international*, III (Paris, 1921), Nos. 1302<sup>n</sup>, 1304<sup>x</sup>.

<sup>15</sup> The British and American courts have held that an individual who has been apprehended in violation of a foreign sovereignty is not competent to resist trial before a court which has jurisdiction of his offense. Thus it was held in *Ex parte Scott* (1829), 9 Barn. & C. 446, that an individual, under indictment in England, had no right to be released by reason of his illegal arrest by a state agent in Belgium. When a prisoner is found within the country, he is amenable to justice, and the court is not called upon to consider the circumstances of his arrest. If it was in violation of another sovereignty, the foreign state has the responsibility for vindicating its own law. See also *Ker v. Illinois* (note 1, above), *U. S. v. Unverzagt* (1924), 299 Fed. 1015, *U. S. v. Insull* (1934), 8 Fed. Supp. 311, and the interstate case of *Mahon v. Justice* (1887), 127 U. S. 700, and the cases cited therein.

Under the law of a given state the courts may be incompetent to release a prisoner who has been arrested by state agents in violation of a foreign sovereignty. It does not follow that the arresting state is under no obligation to restore the prisoner to the state of asylum. Whether the appropriate action is taken by the judiciary or by the executive department would seem to be purely a matter of municipal concern. In Germany, as in the United States, it appears that an individual cannot plead his illegal arrest as a bar to prosecution. *Reichsgericht*, Aug. 29, 1888, 36 *Goldtammers Archiv für Strafrecht und Strafprozess*, 464; Jan. 29, 1900, 33 *Entscheidungen des Reichsgerichts in Strafsachen*, 99; Nov. 3, 1911, 45 *ibid.*, 271; Mar. 24, 1922, 51 *Juristische Wochenschrift* (1922), 1588.

Professor Dickinson has argued forcibly that there is a total lack of national, and hence of judicial, competence in cases of seizure or arrest in violation of international law. This *JOURNAL*, Vol. 28 (1934), 231 ff. This view is accepted in the present note, with the reservation that the question as to whether the courts or the executive shall give effect to the international obligation is purely a matter for national regulation.

United States of one Grogan, who had been seized by British soldiers at Albury, Vermont, and carried off to Canada.<sup>16</sup> When agents of Baden in 1885 pursued a fugitive to Swiss territory, where he was apprehended, the German authorities ordered his release and the punishment of the guilty agents upon the request of the Swiss Government. Similar action was taken in the following year by the Italian Government when Italian customs agents arrested a national on Swiss soil.<sup>17</sup> In 1891 French gendarmes pursued an escaped prisoner to Belgian territory, apprehended him and turned him over to the Belgian police, who conducted him to the frontier, where they returned him to the custody of his original captors. The Belgian Government called attention to the violation of its territory and demanded the release of the prisoner. The Court of Appeal of Douai found that the arrest was invalid as being the result of a violation of foreign territory by French state agents.<sup>18</sup>

There likewise appears to be an obligation to restore to the state of asylum a fugitive who has been arrested on its territory, or induced by fraud to leave its territory, by individuals acting with the complicity of agents of the arresting state. In 1909 one Göntsche, resident of Binningen, Switzerland, received a visit from a stranger, later alleged to have been identified as a German police officer, who invited him to cross the frontier into Germany to search for a lost child. There Göntsche was arrested on a charge of espionage, but was released as being innocent some ten weeks later. In the meantime, the Swiss Government had entered a protest. The German Government expressed its regrets, but maintained that the person who had induced Göntsche to enter German territory was a private individual. It admitted, however, that he had acted under the direction of a German police officer at Leopoldshöhe, who was censured and dismissed for his part in the incident.<sup>19</sup>

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It has sometimes been suggested in American decisions that the state incurs no legal responsibility for an illegal arrest by one of its agents, on the theory that the agents, in acting illegally, act merely as individuals. See *In re Moyer* (1906), 12 Idaho 250, 262. Such a doctrine, whatever may be its validity as a statement of a principle of American administrative law, obviously can not derogate from the international responsibility of the state for acts performed by its agents within the general scope of their competence, although in excess of their legal authority. See Eagleton, *The Responsibility of States in International Law* (New York, 1928), 54 ff.

<sup>16</sup> Moore, *A Treatise on Extradition and Interstate Rendition*, I (Boston, 1891), § 191. For other cases, *ibid.*, §§ 192, 196, and Moore, *Digest of International Law*, IV, § 603.

<sup>17</sup> Clunet, *Questions de droit relatives à l'incident franco-allemand de Pagny* (Paris, 1887), 7-9.

<sup>18</sup> Case of Nollet, April 15, 1891, 18 *Journal de droit international privé* (1891), 1188. See also the case of Wechsler, *Conseil de guerre de Paris*, July 20, 1917, 44 *ibid.* (1917), 1745, and the comment in Travers, *op. cit.*, No. 1302<sup>1x</sup>. Compare the Savarkar case, Permanent Court of Arbitration, Feb. 24, 1911, Scott, *The Hague Court Reports* (1916), 275.

<sup>19</sup> Burckhardt, *Schweizerisches Bundesrecht*, I (Frauenfeld, 1930), No. 18. For other cases, *ibid.*, No. 28.

When a fugitive has been kidnaped by private persons, and, having been brought by force to the territory of a foreign state, is there arrested, there appears to be no obligation to release the prisoner.<sup>20</sup> International responsibility is incurred only through official complicity. *A fortiori*, there is no obligation to surrender the prisoner when officials of the state of asylum have participated in the irregular seizure or arrest.<sup>21</sup> This principle may be regarded as having been established by the Savarkar case.

The arbitral award in the Jacob case may be expected to contribute to the clarification of a difficult and confused branch of international law. In view of the lack of uniformity in the precedents, the tribunal may be obliged to decide, as it is authorized to do under the treaty of 1921, in accordance with "the general principles of law recognized by civilized nations," or with "the principles of law which, in its opinion, should govern international law."<sup>22</sup>

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In 1886 the French Government released a French deserter who had been induced by individuals to enter France from Belgium. He was arrested on French soil by gendarmes who had been forewarned of his arrival. See Alphand, "*L'expulsion des déserteurs et l'extradition déguisée*," 6 *Revue de droit international privé et de droit pénal international* (1910), 52 ff. In a subsequent case, in which the fugitive was delivered to the French authorities by force, the French court asserted its jurisdiction. Travers, *op. cit.*, No. 1302<sup>viii</sup>.

In *Ex parte Wilson* (1911), 63 Tex. Crim. 281, the court refused to discharge a prisoner who had been forced by Mexican citizens upon American territory, where he was arrested on an extradition warrant based upon an indictment pending in Nevada. It was pointed out that Texas officers had no part in the irregular recovery, the court observing that "If it had been shown that the officers of this country were parties to the illegal conduct of the citizens of Mexico, a different case might be presented."

The Schnaebelé case, although frequently cited in this connection, is of doubtful value as a precedent. It was ultimately decided that Schnaebelé, having been invited to a conference on German territory for the discussion of official border problems, enjoyed an administrative safe-conduct. The German Government denied that there had been a violation of French territory or that Schnaebelé had been enticed to German territory for the purpose of placing him under arrest. See Travers, *op. cit.*, No. 1302<sup>v</sup>, and Mettgenberg, *Freies Geleit und Exterritorialität* (Berlin, 1929), 17-21.

<sup>20</sup> There may, however, be an obligation to extradite or to punish the kidnapers. See Villareal *et al. v. Hammond* (1934), 74 Fed. (2d) 503.

<sup>21</sup> See Foreign Relations, 1878, p. 675, and 1906, II, 1121-1122; and Moore, Extradition, §§ 190, 196.

In 1883 the Austrian Government refused to release two persons apprehended on Swiss territory by Austrian customs agents, on the ground that a Swiss gendarme had cooperated in the arrest. Clunet, *op. cit.*, 7. It has been held by the French courts that there is no obligation to release a fugitive from justice expelled by a foreign state to French territory. Case of Gallard, *Cour de cassation*, May 3, 1860, *Dalloz Périodique* (1860), I, 576; case of Lepontois, *Conseil de guerre de Bordeaux*, Mar. 20, 1908, *Bull. crim.*, CXIII, No. 121, p. 218. Several cases *contra* are discussed and criticized in Travers, *op. cit.*, No. 1302<sup>ii</sup>.

<sup>22</sup> Art. 5, 12 League of Nations Treaty Series, No. 320, p. 281.

A NOTE ON RE PIRACY *JURE GENTIUM*

When the Merchant of Venice was reckoning the hazards to which Antonio's ships were subject he recalled that along with the perils of waters, winds, and rocks there were water-thieves and land-thieves,—adding, "I mean pirates." According to this gloss, one who steals at sea is a pirate. Later, Sir Charles Hedges, Judge in the High Court of Admiralty, gave a slightly different definition when he laid it down that "piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty."<sup>1</sup> The statements agree in that each includes a wrongful taking, though robbery requires a further ingredient of violence. Professor Bingham's report on piracy prefers the more inclusive view.<sup>2</sup> But what if the attempt be frustrated—to be a pirate must one be a successful pirate? The offence of piracy *jure gentium* has been admittedly indefinite, even though the Supreme Court has held that it was known with reasonable certainty.<sup>3</sup>

On November 10, 1933, His Majesty in Council referred to the Judicial Committee the question "whether actual robbery is an essential element in the crime of piracy *jure gentium*, or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*." The answer of their Lordships was that a frustrated attempt would equally support the crime.<sup>4</sup> The facts out of which the matter grew were that a number of armed Chinese, cruising in two junks, had pursued and attacked a cargo junk on the high seas. Before the pursuers were able to overhaul their prey they were stopped and taken in charge, brought to Hongkong, and there tried for piracy. The full court held that an actual robbery was an essential element of the crime, and the defendants were therefore acquitted. Later the question was referred to the Judicial Committee under the terms of § 4 of the Judicial Committee Act, 1833. It will be recalled that piracy is something of a staple in courts situated near the China Sea, so that the question was of more than academic interest.

In every country the international law applied by its courts tends to become involved with its municipal law. This is particularly true of the common law countries. And in the opinion of the Board the understanding of the crime of piracy *jure gentium* has been obscured through a misapprehension of the Offences at Sea Act of 1536.<sup>5</sup> Prior thereto pirates had been tried

<sup>1</sup> *R. v. Dawson* (1696), 13 St. Tr. 451, 454.

<sup>2</sup> This JOURNAL, Supplement, Vol. 26 (1932), p. 794.

<sup>3</sup> *United States v. Smith* (1820), 5 Wheat. 153, per Story, J., Livingston, J., dissenting. "Whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy." The case at bar was within this definition, so it was not necessary for the court to be exhaustive.

Prof. Lenoir discusses "Piracy Cases in the Supreme Court" in 25 Journ. of Crim. Law, 532 (1934).

<sup>4</sup> L. R. [1934] A. C. 586; 51 T. L. R. 12; this JOURNAL, Vol. 29 (1935), p. 140.

<sup>5</sup> 28 Hen. VIII, c. 15.

in the Court of the Admiral, according to the course of the civil law. This procedure proving a handicap to prosecution, the Act provided "that all treasons, felonies, robberies, murders, and confederacies hereafter to be committed in or upon the sea . . ." should be tried according to the common law applicable to those offences when committed upon land. "It has been thought," says the report, "that nothing could be piracy unless it amounted to a felony as distinguished from a misdemeanour, and that, as an attempt to commit a crime was only a misdemeanour at common law, an attempt to commit piracy could not constitute the crime of piracy because piracy is a felony as distinguished from a misdemeanour." It is also noted that a number of judges who subscribed to the definition that piracy is only a sea-term for robbery were addressing themselves to cases where actual robbery had been committed.

A moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow passenger, and was therefore liable to the penalty of death.

Conversely,

When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.

Sir Leslie Scott, retained by the Colonial Office to argue one side of the question, had submitted that there was no authority for saying that in the matter at issue international law had developed since the day of Sir Charles Hedges, though he admitted that the result was illogical and the principle unwise if one were legislating internationally. This argument was greeted with the response that

International law was not crystallized in the 17th century, but is a living and expanding code. . . .

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older juriconsults were expressing their opinions.

One hazards little in assuming that the Judicial Committee would be prepared to uphold a conviction for piracy in an attack in or from the air.<sup>6</sup>

<sup>6</sup> Cf. Art. 3 of the Harvard Research Draft Convention on Piracy, this JOURNAL, Supplement, Vol. 26 (1932), p. 768.

The argument at the Board was illuminated by a number of remarks and questions from their Lordships. Before the second day of the hearing Lord Atkin had been provided with Professor Bingham's report and draft convention on piracy in the Harvard Research in International Law. The comprehensive nature of this document created a very evident impression. Lord Macmillan referred to it as "this compilation from which we have all derived so much help," and the Lord Chancellor repeated the remark. The report of the League of Nations Committee of Experts for the Progressive Codification of International Law <sup>7</sup> also received careful attention. It was evident that their Lordships were taken considerably by surprise to find such respectable authority in such unfamiliar form. The argument of counsel came to a halt until the novel materials had been passed back and forth. Inevitably municipal law judges have approached international law with a certain air of condescension. Yet here was a case of substantial matter which commanded unfeigned respect. Another instance is the reference to the judgments of the Permanent Court of International Justice in the Serbian and Brazilian Loan Cases <sup>8</sup> in the consideration of the English gold clause case.<sup>9</sup>

Professor Dickinson has pointed out that the view of international law entertained by municipal judges is related to the postulates on which their whole legal philosophy rests.<sup>10</sup> This is interestingly borne out in the instant case. Uncritical naturalism is, of course, long since exploded. Neither do the judges evince that narrow positivism which marks the prevailing view in the *Franconia Case*.<sup>11</sup> Today judicial thought in England seeks, within the limits appropriate to judicial action, to make the law rational, self-consistent, and adequate to the needs of an expanding society.<sup>11a</sup> Criminal law is a field where expansion without positive authority might seem least consistent with sound public policy. Yet *Rex v. Manley*,<sup>12</sup> supporting a conviction for causing a public mischief, shows how principle may be extended to cover novel forms of wrong-doing. And the judgment of the House of Lords in

<sup>7</sup> C. 196. M. 70. 1927. V.

<sup>8</sup> Ser. A. Nos. 20/21.

<sup>9</sup> *Feist v. Société intercommunale belge d'électricité*. [1933] 1 Ch. 684; [1934] A. C. 161; this JOURNAL, Vol. 28 (1934), p. 374.

<sup>10</sup> "Changing Concepts and the Doctrine of Incorporation," this JOURNAL, Vol. 26 (1932), p. 239.

<sup>11</sup> (1876) 2 Ex. D. 63.

<sup>11a</sup> "The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of facts abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law." McCardie, J., discussing, *obiter*, the doctrine of agency of necessity, in *Prager v. Blatspiel, Stamp and Heacock, Ltd.* [1924] 1 K. B. 566. The dictum in this case was later disapproved by Scrutton, L. J., in *Jebara v. Ottoman Bank* [1927] 2 K. B. 254, 270. Greater rigidity is maintained in the sphere of property. Cf. Keeton and Gower, "Freedom of Testation in English Law," Iowa Law Review, Vol. 20, pp. 326, 327.

<sup>12</sup> [1933] 1 K. B. 529; 49 T. L. R. 130.

M'Alister v. Stevenson,<sup>13</sup> adopting the view of Cardozo, J., in MacPherson v. Buick Motor Co.<sup>14</sup> promises to rationalize the law of tort as to liability for negligence. The view which the Judicial Committee took of the definition of piracy is cast in the same mold.

Where discussion ranged so widely it was inevitable that the relation of international to municipal law should be considered. Lord Macmillan thought the position was this: when the courts sitting in any country have to consider any question of international law it means that their sovereign has adopted the international law as a part of the law of the land, and the reference to international law is only to find what our law is when our law incorporates international law.<sup>15</sup> Lord Tomlin expressed himself to a similar effect. Though the analogy was not suggested, it would probably not be inaccurate to say that in their Lordships' opinion international law is a part of the law of England in the same sense in which French law might be said to be a part of English law when by the English doctrine of private international law French law should be applied by the English court—*e.g.*, as being the proper law of a contract. But with this difference: international law will not be proved by experts, but found by the court with the aid of its own counsel.

Early in the hearing Lord Sankey put to Sir Leslie Scott the question, what are the sources of international law? The reply enumerated custom, treaties, and the writings of the jurists, adding that, historically, the third had been the most important. In the report this line of thought emerges in the remark that

The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal Courts and last, but not least, opinions of juriconsults or text-book writers. It is a process of inductive reasoning. . . . Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

At one point Lord Wright asked, what are the *responsa prudentium* in the matter? Later Lord Atkin said that while the Harvard draft convention was not authority in itself, what was of value was the expression of opinion by juriconsults as to what they think the law is. And Lord Macmillan concluded: Did it not come to this,—one must take it that the law is there, even

<sup>13</sup> [1932] A. C. 562.

<sup>14</sup> (1916) 217 N. Y. 382.

<sup>15</sup> He thought it had been put accurately by Lord Dunedin in *Mortensen v. Peters* (1906), 14 Scots. L. T. 227, this JOURNAL, Vol. 1 (1907), p. 526: "It is a trite observation that there is no such thing as a standard of international law, extraneous to the domestic law of a kingdom to which appeal may be made. International law, so far as this court is concerned is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland." Lord Macmillan was of counsel in *Mortensen v. Peters*.

if inscrutable; was it not necessary to adopt the *better opinion*? It was often so in questions of municipal law. To which the Attorney General respectfully agreed. This attention to the definitions of piracy *jure gentium* propounded by the juriconsults disclosed a frank recognition that juristic writing has in effect been a source of international law.

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## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16–MAY 15, 1935

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *Geneva*, A Monthly Review of International Affairs; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department.

#### November, 1933

- 10 IRISH FREE STATE—SOUTH AFRICA. Exchanged ratifications of trade agreement signed at Ottawa, Aug. 20, 1932. *Irish Treaty Series*, 1933, No. 3.

#### September, 1934

- 14 GERMANY—IRISH FREE STATE. Exchanged notes regarding release of German property. Text: *G. B. Treaty Series*, No. 1 (1935).

#### October, 1934

INTERNATIONAL INSTITUTE OF PUBLIC LAW. 8th Annual meeting held in Paris. *Zeitsch. für öffentl. recht*, April, 1935, p. 269.

#### November, 1934

- 15 SYRIA AND THE LEBANON—UNITED STATES. Supplementary agreement for exchange of money orders between the United States and countries of the Levant under French mandate, signed Oct. 8, 1934, came into force. *T. I. B.*, Jan., 1935, p. 17.
- 17 BULGARIA—TURKEY. Treaty of neutrality, conciliation, judicial settlement and arbitration, signed Mar. 6, 1929, renewed for five years from Dec. 3, 1935. *T. I. B.*, Jan. 1935, p. 1.

#### December, 1934

- 21 CZECHOSLOVAK REPUBLIC—LATVIA. Exchanged ratifications of convention of conciliation, judicial settlement and arbitration signed Oct. 11, 1933. *T. I. B.*, Feb. 1935, p. 1.

#### January, 1935

- 7 GERMANY—SPAIN. Agreement arranged by exchange of notes came into force, by which Spain agreed to German airship service to South America with landings at Barcelona and Seville. *B. I. N.*, Feb. 21, 1935, p. 15.
- 7/31 PANAMA—UNITED STATES. Agreement relating to reciprocal privileges for consular officers effected by exchange of notes. *T. I. B.*, Mar., 1935, p. 16.
- 11 OIL POLLUTION OF THE SEA. League of Nations Organization for Communications and Transit submitted memorandum to Council. Text: *L. N. O. J.*, Feb., 1935, p. 194. (C.527.1934.VII.)

- 17 and Mar. 1 SAAR VALLEY. On January 17, as a consequence of the plebiscite, League Council decided in favor of union with Germany of the whole of the Saar Territory, and fixed March 1 as date for re-establishment of Germany in its government. The transfer took place on March 1 at Saarbrücken. *L. N. M. S.*, Feb., 1935, p. 28; *N. Y. Times*, Mar. 1, 1935, p. 1.
- 22 GREAT BRITAIN—POLAND. Exchanged ratifications of agreement relating to commercial travelers, signed Oct. 26, 1933. *G. B. Treaty Series*, No. 4 (1935).
- 24 ARGENTINA—GREAT BRITAIN. Exchanged ratifications of convention regarding compensation for accidents to workmen, signed Nov. 15, 1929. *G. B. Treaty Series*, No. 9 (1935).
- 28 ITALY—SWITZERLAND. Exchanged ratifications of protocol extending duration of treaty of arbitration and conciliation, signed Aug. 20, 1924. *T. I. B.*, Feb., 1935, p. 1.
- 31 FRANCE—GREAT BRITAIN. Exchanged notes regarding administration of New Hebrides. *G. B. Treaty Series*, No. 7 (1935).
- 31 GREAT BRITAIN—HUNGARY. Signed agreement for provisional dissolution of Anglo-Hungarian Mixed Arbitral Tribunal. Text: *G. B. Treaty Series*, No. 10 (1935). *Cmd.* 4862.

*February, 1935*

- 5 DENMARK—VENEZUELA. Treaty of arbitration, judicial settlement and conciliation signed Dec. 19, 1933, came into force. *T. I. B.*, March, 1935, p. 1.
- 6 BALTIC STATES COÖPERATION. Identic notes from Estonia, Latvia and Lithuania received at League of Nations intimating their intention of acting jointly at League elections and of adopting a rotation principle in their representation at Geneva. *B. I. N.*, Feb. 21, 1935, p. 24; *C. S. Monitor*, Mar. 14, 1935, p. 7.
- 8 GREAT BRITAIN—RUMANIA. Signed agreement, to come into force on Feb. 25, providing for progressive liquidation of trade debts of Rumania. *B. I. N.*, Feb. 21, 1935.
- 11 FRANCE—GERMANY. Signed agreement regarding change of customs régime in the Saar. *B. I. N.*, Feb. 21, 1935, p. 26.
- 13 and Mar. 4 CZECHOSLOVAK REPUBLIC—GREAT BRITAIN. Exchanged notes regarding passports for seamen. *G. B. Treaty Series*, No. 11 (1935). *Cmd.* 4865.
- 13 PANAMA—SPAIN. Treaty of arbitration signed Sept. 22, 1930, came into force. *T. I. B.*, Mar., 1935, p. 1.
- 14 DISARMAMENT CONFERENCE. Two committees of the Conference for the Reduction and Limitation of Armaments resumed work at Geneva on Feb. 14: (1) Committee for regulation of trade in and private and state manufacture of arms, (2) Committee on miscellaneous provisions. The draft on regulation of traffic in arms, submitted in November by American delegate, was chosen as basis of discussion. Summary: *L. N. M. S.*, Feb., 1935, p. 31. Text: *Völkerbund* (Geneva), Feb. 15, 1935; *Press releases*, Dec. 22, 1934, p. 391. On April 13, the Committee which has been studying the draft published the text with its report. *N. Y. Times*, April 14, 1935, p. 35.
- 14-16 SCANDINAVIAN ECONOMIC CONFERENCE. Conference of Scandinavian countries, Finland and Iceland held in Stockholm. *B. I. N.*, Feb. 21, 1935, p. 27.

- 16 HUNGARY—ITALY. Signed cultural convention in Rome. *B. I. N.*, Feb. 21, 1935.
- 18 BELGIUM—IRISH FREE STATE. Signed trade agreement in Brussels. *B. I. N.*, Feb. 21, 1935, p. 12.
- 18 BELGIUM—SWITZERLAND. Signed commercial agreement in Brussels. *B. I. N.*, Feb. 21, 1935, p. 12.
- 18 FRANCE—GERMANY. Signed agreements on the Saar, known as the "Accords of Naples," transferring Saar Basin back to Germany, after 15 years of League of Nations rule. *N. Y. Times*, Feb. 19, 1935, p. 5.
- 18 MUNITIONS INQUIRY IN GREAT BRITAIN. Commission of seven for arms enquiry appointed by Prime Minister MacDonald. *Washington Post*, Feb. 19, 1935, p. 7; *N. Y. Times*, Feb. 19, 1935, p. 6.
- 20 SWEDEN—UNITED STATES. Exchanged ratifications of convention relating to exemption of military obligations in certain cases of double nationality, signed Jan. 31, 1933. *T. I. B.*, Feb., 1935, p. 6; *Press releases*, Feb. 23, 1935, p. 106.
- 21 FINLAND—GREAT BRITAIN. Signed agreement for reciprocal exemption from income tax on profits or gains arising through an agency. *G. B. Treaty Series*, No. 8, (1935).
- 23 to March 15 CHACO DISPUTE BETWEEN BOLIVIA AND PARAGUAY. On Feb. 23, Paraguay notified Secretary-General of intention to withdraw from the League of Nations, as result of decision of Advisory Committee on Jan. 16. Text of telegram and reply of the Secretary-General: *L. N. M. S.*, Feb., 1935, p. 30; *L. N. O. J.*, Mar., 1935, p. 451. On March 11-15, the Advisory Committee adopted a resolution summoning the Assembly for May 20th. Text of resolution. History of the dispute: *L. N. M. S.*, Mar., 1935, p. 63-68. Records of the proceedings: *L. N. O. J.*, Spec. supp., No. 134.
- 24 MILITARY SERVICE. Popular referendum in Switzerland approved by a majority of 75,000 votes the lengthening of military service in all armies. *Affaires étrangères*, Feb., 1935, pp. 88-95.
- 27 BELGO-LUXEMBURG ECONOMIC UNION—UNITED STATES. Signed reciprocal trade agreement in Washington on Feb. 27. *T. I. B.*, Feb., 1935, p. 14; *Press releases*, Mar. 2, 1935, p. 132. Proclaimed by President on April 1. *Press releases*, Apr. 6, 1935, p. 209.
- 27 DOMINICAN REPUBLIC—HAITI. Definitive settlement of 70-year-old boundary dispute announced by the Presidents of the two republics. *Press releases*, Mar. 9, 1935, p. 167. Text of joint statement: *P. A. U.*, May, 1935, p. 370.
- 27 GREAT BRITAIN—POLAND. Signed trade agreement in London. *B. I. N.*, Mar. 7, 1935, p. 18.
- 28 FRANCE—GERMANY. Exchanged notes on demilitarization of Saar Territory. Text: *L. N. M. S.*, March, 1935, p. 77.
- 28 to May 2 MEMEL. On Feb. 28, Lithuania posted troops on border to guard against possible eastward expansion by Germany. *N. Y. Times*, Mar. 4, 1935, p. 8. On March 26, verdict was rendered in trial of 126 Memellanders charged with treason, by military court in Kaunas (Kovno). *Times* (London), Mar. 27, 1935, p. 14. On April 19, Lithuania received joint note on Memel from France, Great Britain and Italy, signatory Powers of Memel convention. *Washington Post*, Apr. 2,

1935, pp. 1 and 9; *B. I. N.*, May 2, 1935, p. 27. On May 2, Lithuania replied to note of April 19. *N. Y. Times*, May 3, 1935, p. 11.

- 28 SAAR (DEMILITARIZED) ZONE. Exchange of notes by France and Germany, in which Germany recognized Saar territory as part of the demilitarized zone, made public by League Secretariat. *B. I. N.*, Apr. 4, 1935, p. 32; *L. N. M. S.*, March, 1935, p. 77.

#### March, 1935

- 2 BELGIUM—NETHERLANDS. Signed trade agreement at The Hague. *B. I. N.*, Mar. 7, 1935, p. 25.
- 2 RUMANIA. Denounced existing trade agreements with United States of America, Japan, Norway and Latvia. *B. I. N.*, Mar. 7, 1935, p. 26.
- 4 BRITISH DEFENSE POLICY. New policy announced to House of Commons in White Paper calling for increases in army, navy and air force. Text: *Times* (London), Mar. 5, 1935, p. 9; *Cmd.* 4237. *N. Y. Times*, Mar. 5, 1935, p. 1; editorial: *Times* (London), Mar. 14, 1935, p. 15; *C. S. Monitor*, Mar. 4, 1935, p. 12.
- 4 SIAM. King Prajadhipok abdicated throne in favor of eleven-year-old nephew, Prince Ananda. Text of document. *N. Y. Times*, Mar. 4, 1935, p. 1.
- 5-6 CARNEGIE ENDOWMENT CONFERENCE. Thirty publicists from ten nations held economic conference in London under chairmanship of Dr. Nicholas Murray Butler. Text of recommendations: *N. Y. Times*, Mar. 9, 1935, p. 6. Comment by Dr. Butler on the work: *N. Y. Times*, Mar. 20, 1935, p. 3.
- 13 to May 14 ABYSSINIA—ITALY. On March 13, Ethiopian and Italian delegates signed *procès-verbal* fixing general conditions for a provisional neutral zone. *B. I. N.*, Apr. 4, 1935, p. 9; *Foreign Affairs*, April, 1935, p. 499. On March 17, Abyssinia appealed to League of Nations under Art. 15 of the Covenant. On Mar. 22, Italy replied to Abyssinia's appeal to the League, to which Abyssinia replied on March 29. Texts: *L. N. M. S.*, March, 1935, p. 68-69. On April 11, Italy replied to note of Abyssinia of March 29, announcing arrangement for arbitration agreed upon April 12 in Geneva. *N. Y. Times*, Apr. 12 and 16, 1935. On April 15, League Council postponed consideration of dispute to May session. *B. I. N.*, Apr. 18, 1935, p. 26. On May 8, Abyssinia sent note to Italy setting forth views on how machinery of conciliation under treaty of 1928 should be applied. *Times* (London), May 7, 1935, p. 15. On May 13, Abyssinia made protest to League Council against report that mobilization had been ordered by the Emperor. *Times* (London), May 14, 1935, p. 16. On May 14, Premier Mussolini, in speech in the Senate, reaffirmed Italy's intention to proceed with her military preparations in East Africa. *N. Y. Times*, May 15, 1935, pp. 1, 15.
- 16 to May 10 CHACO DISPUTE. On March 16, Paraguay accepted with reservations Argentine-Chilean peace formula. *N. Y. Times*, Mar. 17, 1935, p. 20. On April 1, notes from Chile invited cooperation of United States, Peru and Brazil, which was accepted by the United States on April 6. *N. Y. Times*, Apr. 2 and 7, 1935, pp. 13 and 19. On May 1, Brazil accepted invitation. *N. Y. Times*, May 2, 1935, p. 9. On May 10, mediation group was organized at Buenos Aires. *N. Y. Times*, May 11, 1935, p. 8.
- 16 to Apr. 20 GERMAN RE-ARMAMENT. Chancellor Hitler proclaimed system of general compulsory military service in Germany, and increase of peace strength of Reichswehr to about 600,000 men. Failure of powers to fulfill their disarmament obli-

gations under Treaty of Versailles cited as reason for decree. Text of proclamation and law. *Times* (London), Mar. 18, 1935, pp. 11-12; *N. Y. Times*, Mar. 17, 1935, pp. 1, 31; *Völkerbund* (Geneva), Mar. 22, 1935. On Mar. 18, Great Britain sent note of protest to Berlin. Text: *Times* (London), Mar. 19, 1935, p. 16; *N. Y. Times*, Mar. 19, 1935, p. 1. *Cmd.* 4848. French and Italian protests presented Mar. 21. Texts: *Times* (London), Mar. 22, 1935, p. 15; *N. Y. Times*, Mar. 22, 1935, p. 17. Poland's protest of Mar. 23. *N. Y. Times*, Mar. 25, 1935, p. 1. Anglo-German conversations took place on Mar. 25-26. *Times* (London), Mar. 26-27, 1935, pp. 16 and 14; *Völkerbund*, Apr. 9, 1935. On March 31, Anglo-Soviet communiqué issued in Moscow following Mr. Eden's visit. Text: *Times* (London), Apr. 1, 1935, p. 14; *N. Y. Times*, Apr. 1, 1935, pp. 1 and 8.

On April 11-14, France, Italy and Great Britain held conference at Stresa to examine general European situation. Text of joint declaration, including Anglo-Italian declaration and final declaration: *N. Y. Times*, Apr. 15, 1935, p. 1; *G. B. Misc. Ser.*, No. 2 (1935); *Cur. Hist.*, June, 1935, p. 286. On April 17, Council of League, in extraordinary session summoned at instance of France, passed resolution submitted by Great Britain, France and Italy, which finds that Germany has failed in her international duty, condemns unilateral repudiation of obligations, and establishes a committee to devise measures against future unilateral acts likely to endanger European peace. *Times* (London), Apr. 18, 1935, p. 12; *N. Y. Times*, Apr. 18, 1935, p. 1. On April 20, Germany replied to censure of League of Nations. Text: *N. Y. Times*, Apr. 21, 1935, p. 1; *Times* (London), Apr. 22, 1935, p. 10.

- 18 GREAT BRITAIN—ITALY. Provisional agreement regulating imports from the United Kingdom into Italy arranged by exchange of notes on March 18. Summary: *Times* (London), Apr. 30, 1935, p. 15. Text: *G. B. Treaty Series*, No. 14 (1935). *Cmd.* 4883. New trade agreement, to enter into force on May 1, provided for a further period of trial of the provisional agreement of March 18. *B. I. N.*, May 2, 1935, p. 20. Text: *Cmd.* 4883.
- 21 GREAT BRITAIN—POLAND. Exchanged ratifications of convention relating to tonnage measurement of merchant ships. *G. B. Treaty Series*, No. 13 (1935). *Cmd.* 4875.
- 22 LENA GOLDFIELD'S AGREEMENT. Compromise agreement of Nov. 4, 1934, confirmed by Soviet People's Committee. *B. I. N.*, Apr. 4, 1935, p. 25.
- 23 CHINESE EASTERN RAILWAY. Representatives of the U. S. S. R., Japan and Manchukuo signed documents transferring the railway to Manchukuo. Check for \$6,600,000 paid to Russia as first instalment on purchase price of railroad. *C. S. Monitor*, Mar. 23, 1935, p. 3; *Cur. Hist.*, May, 1935, p. 221. Statement by Maxim Litvinoff and details of the C. E. R. agreement. *Economic Review of Soviet Union*, Apr., 1935, p. 85. Summary: *China Weekly Review*, Mar. 30, 1935, p. 143.
- 23 PHILIPPINE ISLANDS. President Roosevelt signed constitution under which the Philippines are to govern themselves for a 10-year commonwealth period. Constitution must be adopted by a plebiscite of the Filipino people in August. *C. S. Monitor*, Mar. 23, 1935, p. 1; *N. Y. Times*, Mar. 24, 1935, II, 4. Text: *Cong. Rec.*, Feb. 25, 1935, pp. 2622-2627.
- 27 JAPAN AND THE LEAGUE. Resignation of Japan from the League of Nations came into force. *Times* (London), Mar. 27, 1935, p. 14; *L. N. M. S.*, Mar., 1935, p. 60. Japan's Permanent Delegate to the League made statement on policy following withdrawal. Joseph Avenol, Secretary General of the League, also gave statement

to press; China made written protest. Editorial on withdrawal: *N. Y. Times*, Mar. 27, 28, 29, 1935, pp. 15, 22 and 20.

- 28 and April 5 GREAT BRITAIN—UNITED STATES. Reciprocal aviation arrangements made by exchange of notes. *Press releases*, Apr. 27, 1935, p. 258.
- 28 HAITI—UNITED STATES. Signed reciprocal favored nation trade agreement in Washington. Text: *Press notice*, Dept. of State, Mar. 27, 1935. Proclaimed on May 4 by President Roosevelt. *Ex. Agr. Ser.*, No. 78.
- 29 and May 1 CZECHOSLOVAK REPUBLIC—UNITED STATES. Agreement amending commercial agreement of Oct. 29, 1923, and Dec. 5, 1924, effected by exchange of notes. *Ex. Agr. Ser.*, No. 74.
- 29 LATVIA—UNITED STATES. Exchanged ratifications of supplementary extradition treaty signed Oct. 10, 1934. *T. I. B.*, Mar., 1935, p. 5. Text: *U. S. Treaty Ser.*, No. 884.

*April, 1935*

- 1 MUNITIONS INQUIRY. Senate Committee Investigating the Munitions Industry issued preliminary report. Text: *Cong. Rec.*, Apr. 1, 1935, p. 4914; *Senate Report* 400 (No. 1), 74th Cong., 1st sess.
- 5 POLAND—UNITED STATES. Signed supplementary extradition treaty at Warsaw. *Press releases*, Apr. 6, 1935, p. 224.
- 6 BELGIUM—FRANCE—LUXEMBURG. Signed commercial agreement for six months, and continued Belgo-Luxemburg Economic Union. *N. Y. Times*, Apr. 7, 1935, p. 6.
- 9 CHINA—GREAT BRITAIN. Exchanged notes for establishment of joint commission to determine southern section of boundary between Burma and Yunnan. *G. B. Treaty Series*, No. 15 (1935). *Cmd.* 4884.
- 9 FRANCE—UNITED STATES. Exchanged ratifications of double taxation treaty of 1932. *C. S. Monitor*, Apr. 9, 1935, p. 5; *Press releases*, Apr. 13, 1935, p. 230.
- 9 GERMANY—RUSSIA. Signed trade agreement in Berlin. *C. S. Monitor*, Apr. 10, 1935, p. 1; *B. I. N.*, Apr. 18, 1935, p. 14.
- 10 MANCHUKUO OIL MONOPOLY. Law promulgated on Nov. 14, 1934, came into force on April 10. British, American and Dutch oil companies are negotiating with authorities in Tokyo. History of monopoly project: *B. I. N.*, May 2, 1935, p. 3-7. Reply to protest of the United States Department of State of Nov. 30, 1934, delivered on April 11, 1935. *N. Y. Times*, Apr. 13, 1935, p. 9; *Cur. Hist.*, June, 1935, p. 325.
- 11 INTERNATIONAL LABOR OFFICE. Opened 70th session during which the United States cast its first vote. *N. Y. Times*, Apr. 12, 1935, p. 4.
- 11-14 STRESA CONFERENCE. Anglo-French-Italian representatives examined general European situation following Germany's proclamation of March 16. *N. Y. Times*, April 13-15, 1935; *G. B. Misc. Series*, No. 2 (1935); *Cur. Hist.*, June, 1935, p. 286.
- 15 CANADA—UNITED STATES. Signed convention at Ottawa for final settlement of difficulties arising through complaints of damage done in Washington State by fumes from smelter of Consolidated Mining & Smelting Co., Trail, B. C. *Press releases*, Apr. 20, 1935, p. 251.
- 15 EMBARGO ON ARMS. Norwegian Parliament adopted resolution prohibiting export of arms to countries involved in civil war unless it be a legal war of defense recognized as such by the League of Nations. *B. I. N.*, April 18, 1935, p. 27.

- 15 LITTLE ENTENTE. Permanent council, meeting at Geneva, expressed agreement in principle with results of Stresa conference. *B. I. N.*, Apr. 18, 1935, p. 30.
- 15 ROERICH PEACE PACT. Signed in Washington by representatives of the 21 American republics, for protection in peace and war of artistic, religious and scientific institutions and historic monuments. New flag created. Text: *Washington Post*, Apr. 16, 1935, p. 12; *Press releases*, Apr. 20, 1935, p. 235; *P. A. U.*, May, 1935, p. 367.
- 16 GERMANY—ITALY. Signed agreement in Rome providing for setting up of two committees to endeavor to eliminate difficulties hampering trade between the two countries. *B. I. N.*, May 2, 1935, p. 22.
- 17 BRAZIL—UNITED STATES. Exchanged notes supplementary to trade agreement of Feb. 2, 1935. Text of notes and of agreement: *Press releases*, Apr. 27, 1935, p. 261.
- 24 LUXEMBURG—UNITED STATES. Signed supplementary extradition treaty. *Press releases*, Apr. 27, 1935, p. 281.
- 29 CZECHOSLOVAK REPUBLIC—UNITED STATES. Signed supplementary extradition treaty at Washington. *Press releases*, May 4, 1935, p. 296.
- 30 FRANCE—SPAIN. Commercial treaty of 1933 denounced by Spain. *B. I. N.*, May 2, 1935, p. 29.

*May, 1935*

- 1 BRITISH MUNITIONS. Royal Commission on the Private Manufacture of and Trading in Arms had its first sitting. Text of statement by Lord Cecil of Chelwood: *Times* (London), May 2, 1935, p. 9; *N. Y. Times*, May 2, 1935, p. 10.
- 2 FRANCE—RUSSIA. Signed treaty of mutual assistance in Paris, which both signatories declared was open to all to sign. Text: *N. Y. Times*, May 4, 1935, p. 4; *Times* (London), May 4, 1935, p. 13.
- 4-6 AUSTRIA-HUNGARY—ITALY. Held conversations in Venice and Florence on common policy to be pursued during conference of Danubian states to be held in Rome in June, 1935. Full agreement on problems connected with proposed pact of non-interference in Central Europe. *Times* (London), May 6-7, 1935, pp. 12 and 15.
- 4 COTTON CONGRESS. International cotton congress ended session in Rome after adopting several resolutions. *Times* (London), May 6, 1935, p. 11.
- 6-9 BALTIC STATES. Diplomatic envoys of Lithuania, Latvia and Estonia, accredited to capitals of the three republics, and the chief officials of their foreign offices, held conference at Kaunas. Political solidarity was reaffirmed and measures for eventual union into one larger economic unit were initiated. *Times* (London), May 6 and 10, 1935, pp. 12 and 14.
- 7 UNITED STATES AND THE LEAGUE. Joint resolution (S. J. Res. 119) providing for membership in the League of Nations introduced by Senator Pope. Text: *Cong. Rec.*, May 7, 1935, p. 7307.
- 10-13 BALKAN ENTENTE. Representatives of Turkey, Yugoslavia and Greece held fifth conference in Bucharest, to plan new non-aggression pact to safeguard peace in Southeastern Europe, to include Bulgaria and Hungary. *N. Y. Times*, May 11-13, 1935, pp. 8, 30, and 9; *Washington Post*, May 14, 1935, p. 9.

## INTERNATIONAL CONVENTIONS

- AÉRIAL NAVIGATION.** Paris, Oct. 13, 1919. Protocol of amendments, Paris, June 15 and Dec. 11, 1929.  
*Adhesion:* Spain. *T. I. B.*, Feb., 1935, p. 10.
- AIR TRAFFIC.** Warsaw, Oct. 12, 1929.  
*Adhesions:*  
 Great Britain (on behalf of certain territories and dependencies).  
 Southern Rhodesia. *T. I. B.*, Feb., 1935, p. 9.
- AIRCRAFT ATTACHMENT.** Rome, May 29, 1932.  
*Ratification deposited:* Germany. *T. I. B.*, March, 1935, p. 7.
- ARGENTINE ANTI-WAR TREATY.** Rio de Janeiro, Oct. 10, 1933.  
*Adhesions:* Bulgaria and Honduras.  
*Ratification deposited:* Cuba. Jan. 21, 1935. *T. I. B.*, March, 1935, p. 4.  
 Text: *R. D. I.* (Habana) March, 1935, p. 94.
- ASYLUM CONVENTION.** Havana, Feb. 20, 1928.  
*Ratification deposited:* Dominican Republic. Dec. 26, 1934. *T. I. B.*, Jan., 1935, p. 8.
- BILLS OF HEALTH.** Paris, Dec. 22, 1934.  
 Signatories and text: *G. B. Treaty Series*, No. 12 (1935). Cmd. 4869.
- BILLS OF LADING.** Brussels, Aug. 25, 1924.  
*Ratification (and text):* United States. Apr. 1, 1935. *Cong. Rec.*, Apr. 1, 1935, p. 4935.
- COPYRIGHT.** Berne, Sept. 9, 1886. Revision. Rome, June 2, 1928.  
*Adhesion:* Australia. *T. I. B.*, Feb., 1935, p. 17.  
*Ratification:* United States. Apr. 19, 1935. Text: *Cong. Rec.*, Apr. 22, 1935, p. 6321.
- COUNTERFEITING CURRENCY AND PROTOCOL.** Geneva, April 20, 1929.  
*Ratification:* Danzig. Mar. 1, 1935. *L. N. O. J.*, April, 1935.
- ECONOMIC STATISTICS.** Geneva, Dec. 14, 1928.  
*Accession deposited:* Chile. Nov. 20, 1934. *T. I. B.*, Jan., 1935, p. 18.
- EDUCATIONAL FILMS.** Geneva. Oct. 11, 1933.  
*Adhesion:* Persia (Iran). *T. I. B.*, March, 1935, p. 5.  
*Ratification:* Chile. March 20, 1935. *L. N. O. J.*, April, 1935.  
*Ratification deposited:* Italy. Nov. 21, 1934. *T. I. B.*, Jan., 1935, p. 8.
- EIGHT-HOUR DAY.** Washington, Nov. 28, 1919.  
*Ratification:* Canada. Mar. 21, 1935. *L. N. O. J.*, April, 1935.
- EXTRADITION.** Montevideo, Dec. 26, 1933.  
*Ratification:* Uruguay. *T. I. B.*, March, 1935, p. 5.  
*Ratification deposited:* Dominican Republic. Dec. 26, 1934. *T. I. B.*, Jan., 1935, p. 9.
- GENERAL ACT FOR PACIFIC SETTLEMENT.** Geneva, Sept. 26, 1928.  
*Accession:* Ethiopia. Mar. 15, 1935. *L. N. O. J.*, April, 1935.
- INTER-AMERICAN ARBITRATION TREATY.** Washington, Jan. 5, 1929.  
*Ratification:* United States. Apr. 1, 1935. *Cong. Rec.*, Apr. 1, 1935, pp. 4932-4.
- LOAD LINE CONVENTION.** London, July 5, 1930.  
*Ratification deposited:* Greece. Dec. 4, 1934. *T. I. B.*, Jan., 1935, p. 15.
- MOTOR VEHICLES TAXATION.** Geneva, Mar. 30, 1931.  
*Accessions:* Ceylon, Cyprus, Gold Coast, Hong-Kong, Jamaica, Malta, Windward Island.  
 Jan. 3, 1935. *L. N. O. J.*, March, 1935, p. 442.

MULTILATERAL COMMERCIAL AGREEMENT INCLUDING FAVORED-NATION CLAUSE. Washington, July 15, 1934.

*Signatures:*

Nicaragua. Jan. 23, 1935. *T. I. B.*, Jan., 1935, p. 14.

Belgium. *T. I. B.*, March, 1935, p. 11.

*Ratification:* Cuba. *T. I. B.*, March, 1935, p. 11.

NARCOTICS. Geneva, July 13, 1931.

*Ratification deposited:* Costa Rica and Greece. *T. I. B.*, Feb., 1935, p. 7.

NATIONALITY CONVENTION. The Hague, Apr. 12, 1930.

*Ratification:* China. Feb. 14, 1935. *L. N. O. J.*, March, 1935, p. 442.

NATIONALITY. Protocol on statelessness. The Hague, Apr. 12, 1930.

*Ratifications:*

China. Feb. 14, 1935. *L. N. O. J.*, March, 1935.

Chile. March 20, 1935. *L. N. O. J.*, April, 1935.

NATIONALITY. Special protocol on statelessness. The Hague, Apr. 12, 1930.

*Ratification:* China. Feb. 14, 1935. *L. N. O. J.*, March, 1935, p. 442.

NATIONALITY OF WOMEN CONVENTION. Montevideo. Dec. 16, 1933.

*Ratification:* Honduras. *Equal Rights* (Baltimore), Mar. 30, 1935, p. 29.

OPIUM CONVENTION, 2D. Geneva, Feb. 19, 1925.

*Adhesion deposited:* Costa Rica. Jan. 8, 1935. *T. I. B.*, Feb., 1935, p. 7; *L. N. O. J.*, March, 1935.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional clause. Geneva, Dec. 16, 1920.

*Signature:* Lithuania. Jan. 14, 1935. *L. N. O. J.*, April, 1935.

*Signature and ratification:* Latvia. *L. N. O. J.*, March, 1935, p. 441.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of accession of United States. Geneva, Sept. 14, 1929.

*Ratification:* Ethiopia. Mar. 30, 1935. *L. N. O. J.*, April, 1935.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of revision of statute. Geneva, Sept. 14, 1929.

*Ratification:* Ethiopia. Mar. 30, 1935. *L. N. O. J.*, April, 1935.

POSTAL CONVENTION. Cairo, Mar. 20, 1934.

*Ratifications:*

Egypt. Dec. 27, 1934. *T. I. B.*, Jan., 1935, p. 15.

Spain. *T. I. B.*, March, 1935, p. 13.

*Ratification deposited:* Philippine Islands. *T. I. B.*, Feb., 1935, p. 18.

RED CROSS. Geneva, July 27, 1929.

*Ratification deposited:* Japan. Dec. 19, 1934. *T. I. B.*, Jan., 1935, p. 6.

REFUGEES (International status). Geneva, Oct. 28, 1933.

*Ratification deposited:* Bulgaria (with reservation). Dec. 19, 1934. *T. I. B.*, Jan., 1935, p. 11.

RIGHTS AND DUTIES OF STATES. Montevideo, Dec. 26, 1933.

*Ratification deposited:* Dominican Republic. Dec. 26, 1934. *T. I. B.*, Jan., 1935, p. 5.

ROERICH PACT. Washington, Apr. 15, 1935.

*Signatures:* *Press Releases*, Apr. 20, 1935, p. 235; *P. A. U.*, May, 1935, p. 367.

SUBMARINE CABLES. Paris, Mar. 14, 1884. Declaration. Dec. 1, 1887. Protocol, July 7, 1887.

*Adhesion:* Poland.

List of countries in respect of which convention is in force: *T. I. B.*, Jan., 1935, p. 19.

TELECOMMUNICATIONS CONVENTION. Madrid, Dec. 9, 1932.

*Ratifications:*

Australia [and mandated territories].

Estonia. Sept. 10, 1934. *T. I. B.*, Jan., 1935, p. 18.

*Ratification deposited:* Colombia, Ethiopia and Yugoslavia. *T. I. B.*, Dec., 1934, p. 23.

List of ratifications and adhesions: *T. I. B.*, March, 1935, p. 13.

TRADE-MARK AND COMMERCIAL CONVENTION AND PROTOCOL. Washington, Feb. 20, 1929.

*Ratifications:*

Honduras. *T. I. B.*, Mar., 1935, p. 12.

Panama. Dec. 28, 1934.

*Ratification deposited:* Peru. *T. I. B.*, Jan., 1935, p. 14.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.

*Ratification deposited:* Sweden. Jan. 1, 1935. *T. I. B.*, Jan., 1935, p. 15.

UNIVERSAL POSTAL UNION. London, June 28, 1929.

*Ratification:* Bolivia. Dec. 5, 1933. *T. I. B.*, Jan., 1935, p. 17.

*Ratification deposited:* Ecuador. *T. I. B.*, March, 1935, p. 12.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.

*Ratifications:*

Canada. March 21, 1935. *L. N. O. J.*, April, 1935.

Switzerland. *T. I. B.*, Feb., 1935, p. 18.

WEIGHT OF PACKAGES ON VESSELS. Geneva, June 21, 1929.

*Ratifications deposited:*

Lithuania. *T. I. B.*, Nov., 1934, p. 13.

Switzerland. *L. N. O. J.*, Dec., 1934.

WHITE SLAVE TRADE (Women of full age). Geneva, Oct. 11, 1933.

*Adhesion:* Persia (Iran). *T. I. B.*, March, 1935, p. 6.

*Ratification:* Chile. March 20, 1935. *L. N. O. J.*, April, 1935.

WORKMEN'S COMPENSATION FOR ACCIDENTS IN LOADING AND UNLOADING SHIPS. Geneva, June 21, 1929. Revision, Apr. 27, 1932.

*Ratification:* Great Britain. *T. I. B.*, Feb., 1935, p. 18.

M. ALICE MATTHEWS

## BARCS-PAKRAC RAILWAY CO. v. YUGOSLAVIA

AWARD OF THE ARBITRATORS APPOINTED BY RESOLUTION OF THE COUNCIL OF  
THE LEAGUE OF NATIONS OF JANUARY 17, 1934

*Rendered at Paris, October 5, 1934 \**

The petitioners' railway was constructed in Hungary under a charter granted by the government in 1884. By a subsequent agreement, duly approved by the Hungarian Government, the operation of the railway was leased to the Südbahn Co. for the entire period of the concession, on terms providing for the division of the receipts in certain percentages between the two companies. By the Treaty of Trianon of 1920 the territory on which the railway is located was transferred to Yugoslavia. The treaty provided that privately-owned railways in ceded territories should be reorganized and regulated by an agreement between the owning company and the successor state, and that any differences on which agreement was not reached should be submitted to arbitrators designated by the Council of the League of Nations. (Art. 304.)

By an agreement concluded at Rome on March 29, 1923, the Yugoslav Government took over the operation of the Südbahn system; but no agreement was reached concerning the financial relations to be established between the Yugoslav Government as successor to the Südbahn Co. under the operating lease, and the Barcs-Pakrac Railway Co. as the original grantee of the concession.

The arbitrators held that Yugoslavia occupies the dual position of concessionary state towards the Barcs-Pakrac Railway Co. and successor to the operating lease of the Südbahn Co.; that in these capacities the Yugoslav Government is bound to maintain the main features of the contractual position of the Barcs-Pakrac Co. as they existed prior to the war but is not obliged to observe literally all the terms of the contract, especially as those terms may have been affected by the changed economic and financial situation of Central Europe subsequent to the war, and taking into consideration the further fact that the operating company is now a state and not a private company.

The award fixes the amount due up to December 31, 1934, and prescribes the administrative and technical reorganization of the company from that period to the termination of the concession.

### [Translation]

We, the Undersigned,

J. G. Guerrero, former Minister for Foreign Affairs of Salvador, former Vice-Chairman of the Advisory and Technical Committee for Communications and Transit of the League of Nations, Vice-President of the Permanent Court of International Justice;

René Mayer, *Maitre des Requêtes honoraire* at the *Conseil d'Etat de France*, Member of the Permanent Legal Committee of the Advisory and Technical Committee for Communications and Transit;

A. Politis, former Director of the Greek Railways, former Vice-Chairman of the Advisory and Technical Committee for Communications and Transit, Technical Adviser to the Greek Legation in Paris;

appointed by resolution of the Council of the League of Nations, dated January 17, 1934,<sup>1</sup> as arbitrators to settle the disputes standing in the way of

\* League of Nations Official Journal, December, 1934, 15th year, No. 12, Part I, pp. 1679-1686.

<sup>1</sup> See Official Journal, February, 1934 (Part I), p. 123.

agreement between the Barcs-Pakrac Railway Company, Ltd., Budapest, of the one part, and Hungary and Yugoslavia, the States territorially concerned, of the other part;

Having regard to Article 304 of the Treaty of Trianon, which provides as follows:

With the object of ensuring regular utilization of the railroads of the former Austro-Hungarian Monarchy owned by private companies which, as a result of the stipulations of the present treaty, will be situated in the territory of several States, the administrative and technical reorganization of the said lines shall be regulated in each instance by an agreement between the owning company and the States territorially concerned.

Any differences on which agreement is not reached, including questions relating to the interpretation of contracts concerning the expropriation of the lines, shall be submitted to arbitrators designated by the Council of the League of Nations;

Having regard to the petition of the Barcs-Pakrac Railway Company, Limited, dated November 11, 1932;

Having regard to the minutes of the seventy-eighth ordinary session of the Council of the League of Nations;

Having regard to the memoranda and documents laid before us by the petitioning company, of the one part, and more especially its articles of association, the concession and the operating contract, and by the Hungarian and Yugoslav Governments, of the other part;

Having regard to the Agreement concluded at Rome on March 29, 1923, between the Republic of Austria, the Kingdom of Italy, the Kingdom of the Serbs, Croats and Slovenes and the Südbahn Company, after hearing the representations made by the committee acting on behalf of the holders of the bonds issued by the aforesaid company, with a view to the administrative and technical reorganization of the Südbahn system;

Having regard to our previous decision, dated March 21, 1934, with regard to the evaluation of the cost of arbitration and the provisional allocation of the necessary advances;

Having regard to the decision of the President of the Council of the League of Nations, dated March 20, 1934, fixing, after consultation with the parties, the amount of the honoraria to be paid to the arbitrators;

Having heard the observations of the representatives of the Barcs-Pakrac Railway Company, Ltd., the Royal Hungarian Government and the Royal Yugoslav Government respectively;

And given due consideration thereto;

Whereas, by a charter issued by the Royal Hungarian Minister of Public Works and Communications, dated March 9, 1884, one Henry Beniès, whose rights were subsequently made over in good and due form to the petitioning company, was granted a concession for a period of ninety years as from the

date of the commencement of operation, to wit, November 4, 1885, to November 3, 1975, for a local railway, the main line of which was to run from Barcs to Pakrac with branch lines from Suhopolje to Slatina and from Bastiji to Zdenici; and whereas, of the total length of line of the railway for which the aforementioned concession was granted—namely, 128 kilometres 794 metres—almost all—namely, 127 kilometres 147 metres—is now situated, as a result of the territorial adjustments consequent upon the Treaty of Trianon, in Yugoslav territory, all that remains in Hungarian territory being a section only 1 kilometre 647 metres in length to the north of the Drave and terminating at the Barcs station of the former Südbahn Company;

Whereas, under an agreement, dated May 10, 1884, and duly approved by the Royal Hungarian Minister of Public Works and Communications, the grantee made over the operation of the Barcs-Pakrac Railway, together with its branch lines, to the Südbahn Company for a period equal to that of the aforesaid company's own concession; and whereas, under Article 7 of the aforementioned agreement, the operating company was to receive from the grantee, by way of indemnity, 50 per cent of the railway's annual gross receipts up to a total of 600,000 florins, Austrian currency (*Oesterreichische Währung*), 20 per cent of any further gross receipts between the totals of 600,000 and 900,000 florins and, in the event of the annual gross receipts exceeding 900,000 florins, 40 per cent of such total receipts; and whereas, the surplus resulting after the annual settlement of accounts was to go to the grantee, who was further guaranteed in any case an annual minimum sum of 300,000 florins, Austrian currency, even if the settlement of accounts in accordance with the rules set out above were to result in a lower figure, such minimum sum being payable in cash, in two equal moieties on June 20 and December 20 of each year; and whereas, on the basis of the foregoing stipulations, the Barcs-Pakrac Railway Company, Ltd., was formed by the issue of 25,000 ordinary shares of the nominal value of 400 crowns and 30,000 preference shares of the same nominal value, the said capital of 22 million crowns being employed in establishing the railway in question;

Whereas, in pursuance of the aforementioned operating contract, the Südbahn Company carried on the operation of the Barcs-Pakrac Railway Company up to January 1, 1923, being the date of the retroactive entry into force of the Rome Agreement concluded on March 29, 1923, in application of Article 304 of the Treaty of Trianon and Article 320 of the Treaty of St. Germain with a view to the administrative and technical reorganization of the Südbahn system; whereas, on September 1, 1923, in compliance with the stipulations of the Rome Agreement, the Yugoslav State, acting through the State Railways, took over the operation of such of the lines of the former Südbahn Company as were situated in the territory of the Kingdom of Yugoslavia;

Whereas Article 11 of the said agreement provides as follows:

(1) All the rights and obligations of the (Südbahn) company in connection with the operation of the system shall be transferred to the operating State as soon as operation is begun, unless otherwise provided in the following articles;

(2) The States shall also be substituted for the company in all lease and operating contracts concluded by the latter with other railway administrations;

Whereas, in pursuance of Article 11, § 2, of the Rome Agreement as quoted above, the Yugoslav State, in its capacity as successor to the former Südbahn Company, took over on September 1, 1923, with retroactive effect as from January 1 of the same year, the operation of the Barcs-Pakrac Railway, together with its branch lines, operation being carried on by the Yugoslav State Railways as far as Barcs Station in Hungarian territory; and whereas, on July 1, 1932, the Hungarian State, on its side, took over the operation of the Hungarian lines of the former Südbahn Company in conformity with the provisions of the Rome Agreement, though this proceeding was without effect upon the operation of the Barcs-Pakrac Railway, which remained in the hands of the Yugoslav State Railways;

Whereas, since 1923, it has been impossible to reach agreement between the petitioning company and the Yugoslav State with regard to the financial relations to be established between the grantee of the concession and the operating State; and whereas, the petitioning company asks the arbitrators appointed by the Council of the League of Nations, in application of Article 304 of the Treaty of Trianon, to pronounce, in default of agreement, on the administrative and technical reorganization of the Barcs-Pakrac Railway, and to recognize that those clauses of the operating contract which were binding upon the former Südbahn Company and more especially Article 7 of the aforesaid contract, which fixes the amounts to be paid to the operator and grantee respectively, are fully binding upon the Yugoslav State; and whereas, the company further asks the arbitrators to decide that, in so far as concerns itself, the sums thus computed shall be expressed in terms of a gold currency at the pre-war gold parity of the Austrian crown, and that the same shall apply to the capital sums to be taken as the basis for the expropriation of its system, should such a contingency arise; and whereas, it claims the payment, with the appropriate interest in each case, of the sums which it should have received, from the Yugoslav State on these bases, annually since 1923 and asks the Arbitral Board to decide upon the various measures necessitated by the administrative and technical reorganization of its system, which today is situated in the territory of two different States, and more especially to lay down such rules as may be necessary to ensure the future observance by the Hungarian and Yugoslav States of their obligations under Article 11, § 2, of the Rome Agreement;

Whereas, the Royal Yugoslav Government contests these claims, submit-

ting that it is impossible to apply, without revision, the operating contract concluded when the concession was first granted—that is to say, at a time when the upheavals caused by the war and its aftermath in Central Europe could not be foreseen in the common intention of the parties; and whereas, pleading the decrease in the value of the railway in question and the considerable increase in operating costs which the State has had to bear, the Yugoslav Government argues that the remuneration of the petitioning company's capital on a gold basis cannot possibly be contemplated and asks the arbitrators to draw up a new set of financial rules which shall be binding upon the petitioning company and the Yugoslav State with retroactive effect as from the 1923 financial year, when the Yugoslav State took over the operation of the Barcs-Pakrac Railway;

Whereas, lastly, the Royal Hungarian Government, while in general associating itself with the arguments of the petitioning company, submits that the Hungarian State has never performed any act connected with the operation of the railway in question and has, in reality, no concern in the present dispute, for which it is not responsible and the costs of which it cannot be expected to bear;

Whereas, under Article 304 of the Treaty of Trianon, the arbitrators' award was to contain a final and comprehensive settlement of the questions raised in the company's petition to the Council of the League of Nations and to that end:

(1) Settle the claims of the petitioning company in respect of the period extending from the beginning of the 1923 financial year to the end of the 1934 financial year;

(2) Fix the respective rights of the grantee and the operating State for the future as from January 1, 1935, together with all such measures as might be necessary for the administrative and technical reorganization, within the meaning of Article 304 of the Treaty of Trianon, of the system in respect of which the petitioning company had been granted its concession;

(3) Interpret the contractual provisions regarding the expropriation of the lines in accordance with paragraph 2 of the same article and, if necessary, decide how such appropriation should be carried out.

AS REGARDS THE INTERPRETATION OF ARTICLE 11, § 2, OF THE ROME AGREEMENT AND THE VALIDITY OF THE PROVISIONS OF THE OPERATING CONTRACT OF  
MAY 10, 1884

Whereas, under the provisions of Article 11, § 2, of the Rome Agreement, the Yugoslav State, which, in consequence of the Treaties of Peace, had already become the concessionary State as towards the Barcs-Pakrac Railway Company, Limited, in respect of almost all the lines belonging to its system, was invested with another character, that of successor to the company which had been operating that railway, and, as such, was therefore bound to the

petitioning company by legal relationships which were quite distinct from those arising out of the concession proper; and whereas, the fact of such succession, which the petitioning company can plead in substantiation of its case against the Yugoslav State, cannot result in placing the latter under an obligation to execute, in their entirety and without modification, the provisions of the operating contract both as to their actual terms and general purport; and whereas, though the petitioning company is within its rights in maintaining that the main features of its contractual position prior to the war should have been respected by the Yugoslav State and must be restored in any new arrangements which may be concluded, and though, more particularly, the minimum sums payable in cash which the grantee was to receive in any event must remain unaffected by the results of the operation of the railway, it in no wise follows that such sums must continue to be calculated in the manner laid down in the operating contract of May 10, 1884;

Whereas, indeed, on the one hand, though that contract must be respected as to its main characteristics, to contemplate its literal application would be to misunderstand the position which arose out of the war of 1914-1918, together with its political and economic consequences and the Treaties of Peace, more particularly Article 304 of the Treaty of Trianon, and also to misunderstand the extent of the powers of the arbitrators for whose action that article provides; and whereas, the said arbitrators are required to modify the contractual position in question in such ways as the events subsequent to 1918, which could not have been foreseen in the common intention of the parties when the operating contract was concluded, may have rendered necessary; and whereas, the said arbitrators are required to have regard to the undoubted rise in the coefficient of operation of the railways, which could not indeed be left out of account in the revision of any such contract, and also to the other unfortunate economic consequences of the war and its effects on economic organization in Central Europe, the financial and monetary upheavals which ultimately resulted therefrom and the appreciable changes which such upheavals have themselves caused in the capacity of payment of States;

Whereas, on the other hand, though Article 11, § 2, of the Rome Agreement thus secured to the Barcs-Pakrac Railway Company the benefit of the maintenance, to its own advantage, of all such provisions of the operating contract the execution of which, after contractual or arbitral revision, is not incompatible with the position resulting from the war, the treaties and the provisions of the Rome Agreement itself with regard to the administrative and technical reorganization of the system of the former Südbahn Company, the fact should not be overlooked that, in consequence of the aforesaid provision, which is to the advantage of the petitioning company, the operation of its railway passed from the hands of a private company to those of a State; and whereas, that difference in the character of the juridical person operating the railway entails certain consequences which the arbitrators, in default of

the new agreement for which Article 11, § 2, of the Rome Agreement prepared the way, after laying down the principle which it enunciates, must take into account in their decisions regarding the administrative and technical reorganization of the Barcs-Pakrac Railway; and whereas, the succession or substitution provided for in Article 11, § 2, must be construed to mean that, since the Yugoslav State, as mentioned above, combines the characters of concessionary State and operator of the railway, it has become liable as towards the petitioning company for the payment of royalties in respect of the use of the lines, their appurtenances and accessories, by analogy with the provisions of Article 15 of the Rome Agreement fixing the obligations of the State which was itself to take over the operation of the lines of the former Südbahn Company; and whereas, the provisions decided upon by the arbitrators in regard to the amount of such royalties and the manner of their computation and payment shall supersede the clauses regarding the division of the receipts and the minimum guarantee mentioned in Article 7 of the operating contract of May 10, 1884;

Whereas, on the other hand, the Yugoslav State, in taking over, as it was obliged to do by the aforesaid Article 11, § 2, of the Rome Agreement, the operating contracts concluded by the former Südbahn Company with other railway authorities, assumed as towards the latter distinct obligations, the effect of which was to prevent the incorporation pure and simple of the systems belonging to such authorities in the Yugoslav State Railways system; and whereas the said obligations included that resulting from the operating contract concluded by the petitioning company—namely, that it should keep a separate operating account, or at least an account of all the receipts of the Barcs-Pakrac Railway, and should submit to the grantee of the concession annual statements of such receipts as a basis for the settlement of the respective claims of the grantee and the operating authority;

Whereas, in short, the contractual provisions, which before the war were binding upon the petitioning company in its relations with the former Südbahn Company, and which cannot be deemed either to have been entirely invalidated through the fact that the Südbahn has discontinued operation or entirely valid and binding upon the Yugoslav State through the fact of its having been substituted for that company under the Rome Agreement, require revision with a view, on the one hand, to their modification in such respects as may have been rendered necessary by the events of the last twenty years, which could not be foreseen in the common intention of the parties when operation first began, and, in the second place, with a view to the continued operation of the Barcs-Pakrac Railway as a separate line belonging to a third party, while at the same time adjusting the rules laid down for that purpose so as to allow for the fact that operation has passed from private hands into the hands of a State which has taken over such operation as being accessory to the direct management by its own State Railways of the Yugoslav lines of the former Südbahn Company.

AS REGARDS SETTLEMENT IN RESPECT OF THE PERIOD JANUARY 1, 1923, TO  
DECEMBER 31, 1934

Whereas, it is clear from the preliminary examination of the dispute that, contrary to its obligations under Article 11, § 2, of the Rome Agreement as defined above, the Yugoslav State has failed to keep a special operating account or even a statement of the receipts of the Barcs-Pakrac Railway system, even though the organization of the former Südbahn Company and the previous practice of the administration of the said company would have made this perfectly feasible; and whereas, in these circumstances, the petitioning company contests the figures produced before the arbitrators by the Royal Yugoslav Government as representing the amount of the receipts of the Barcs-Pakrac line for the years 1923-1933 inclusive; and whereas, it takes exception both to the data used for the computation of the volume of passenger and goods traffic carried by the line in question as well as for the classification of the goods, and also to the average journeys taken as a basis for the calculations, and to the average return per kilometre-passenger and per kilometre-ton as shown by the foregoing data, the operating contract entitling it, according to its contention, to have the railway for which it held a concession credited with the receipts resulting from the application of the local tariff to the effective traffic carried on the lines of its system; and whereas, it had asked the arbitrators to order an expert examination in respect of one of the years of the period under consideration as a test case, which will permit of the rectification of the computations submitted by the Royal Yugoslav Government, and in that way of the exact determination of the receipts of the railway during the said period, so as to provide a sound basis for the calculation of the indemnity to which it is entitled;

Whereas, as regards the request for an expert investigation, the lack of a special account of the receipts of the Barcs-Pakrac system and the non-existence in the stations and offices of the accountancy documents necessary for the reconstitution of such an account would mean that any expert investigation would inevitably be of a very unreliable character whatever the time and care expended upon it; and whereas, the petitioning company obviously realizes this fact as, instead of asking that the experts should be instructed to reconstitute the receipts of the system for the whole of the period 1923 to 1934, it merely requests that such an investigation should be set on foot with a view to ascertaining the result of a single year and thus working out one or more ratios which might be used to rectify, for the whole of the period under consideration, the computations based on a different method produced by the Royal Yugoslav Government; and whereas, the result of such a proceeding, even if feasible, would be of very doubtful value; and whereas, lastly, in consequence of the modifications which the arbitrators, in the exercise of their right of final decision, propose to make in the assignment to the petitioning company, in application of the principles recapitulated

above and after modification of the original clause of the operating contract, of a proportion of the gross receipts, it could in any case serve no useful purpose, in so far as the regulation of past claims is concerned, to proceed to a more nearly exact calculation of the receipts of the Barcs-Pakrac system during the period 1923 to 1934;

Whereas, such being the case, it is unnecessary for the arbitrators to order the expert investigation applied for; and whereas, having regard to the principles set out above, they already possess, in the documents supplied in the course of the preliminary examination and the computations and observations submitted by both parties in the course of the hearings, sufficient data to enable them, after due consideration of all the facts of the case, to fix, in respect of the period January 1, 1923, to December 31, 1934, the amount of the indemnity to be paid to the petitioning company as royalties for the use of the lines and their appurtenances by the Yugoslav State, such indemnity to include all the claims of the aforesaid company without exception, together with the interest accrued in respect of payments in arrears up to December 31, 1934, and at the same time to make allowance for the sums, totalling seven million dinars, paid to the company by the Yugoslav State on dates which for the purpose of the present proceedings are no longer contested, it being understood that the company shall be relieved of all payments and all liabilities in respect of the costs of new or additional works carried out on the Barcs-Pakrac system during the period under consideration; and whereas, on an equitable evaluation, the amount of the aforesaid indemnity may be fixed at three million seven hundred and eighty thousand four hundred and forty-four gold francs (3,780,444 francs), the expression gold francs to mean the gold currency of the weight and fineness adopted by the Latin Union (Convention of November 6, 1885), to wit, the twentieth part of a gold coin weighing 6.45161 grammes and of a fineness of 900/1000ths.

AS REGARDS THE SETTLEMENT OF CLAIMS IN RESPECT OF THE PERIOD SUBSEQUENT TO JANUARY 1, 1935

AS REGARDS THE ADMINISTRATIVE AND TECHNICAL REORGANIZATION OF THE SYSTEM OF THE BARCS-PAKRAC RAILWAY COMPANY, LIMITED

Whereas, no suggestion has been made that the present operation of the system and more especially the operation of the Barcs-Pakrac line throughout its entire length, including the section in Hungarian territory, by the Yugoslav State Railways has given rise to any difficulties whatsoever; and whereas, such operation should be continued, the rights of the Royal Hungarian Government in the event of expropriation being reserved in the manner hereinafter set out; and whereas, it need only be specified that the Yugoslav State may not compel the petitioning company to resume operation of the railway until the end of the concession, and whereas, in the event of the Yugoslav State's availing itself of its right to retransfer the operation of its line to the Danube-Save-Adriatic Railway Company (the former Südbahn

Company) under Article 13, § 4, of the Rome Agreement, the said company will be substituted for the Yugoslav State in the operation of the Barcs-Pakrac Railway and in regard to that State's obligations as towards the petitioning company in respect of the royalties due to the latter for the use of its system, such substitution to take effect as from the date of the re-transfer of the lines to the Danube-Save-Adriatic Railway Company.

AS REGARDS THE ROYALTIES DUE TO THE PETITIONING COMPANY IN RESPECT  
OF THE USE OF THE BARCS-PAKRAC RAILWAY AND ITS APPURTENANCES

Whereas, as has been stated above, the provisions of Article 11, § 2, of the Rome Agreement require the Yugoslav State to keep a separate account of the gross receipts of the Barcs-Pakrac Railway, the transport tax being deducted; and whereas, though Article 4 of the operating contract of May 10, 1884, provides that the tariffs and the conditions of their application are fixed by the concession, the assent of the grantee being necessary before the tariffs can be reduced, that provision can no longer be applied to the Yugoslav State, which is operating the Barcs-Pakrac Railway and paying royalties for its use, and whereas, the right to fix local or through tariffs resides in that State, in whose territory almost the whole of the system in question is situated; but, whereas, whatever tariffs may have been fixed by the Yugoslav State and collected by it from the public, it cannot in its financial relations with the company holding the concession incorporate, purely and simply, the traffic carried on the Barcs-Pakrac Railway in the total traffic carried on all the Yugoslav railways for the purpose of ascertaining the receipts forming the basis of the royalties due to the aforesaid company; and whereas, the petitioning company is within its rights in asking that for the purpose of drawing up the statement of receipts defined above, which statement is to be communicated not later than June 30 of the year following the close of each year of operation, to the legal representative which the petitioning company shall be required to appoint in Yugoslavia, all classes of passenger and goods traffic carried on its system shall be assessed, in respect of the distance actually travelled on that system, at the local tariff fixed by the Yugoslav State without prejudice, however, to the subsequent conclusion of an agreement between the competent authorities of the Yugoslav State and the petitioning company to the effect that the compilation of the aforesaid annual statement shall be facilitated by the adoption of fixed ratios for the apportionment of receipts;

Whereas, after equitable consideration of the facts of the case, the annual royalties which the Yugoslav State shall pay to the petitioning company for the use of the railway and its appurtenances shall be fixed at 22.5 per cent of the gross receipts of the Barcs-Pakrac Railway, as shown in the statements made out in the manner described above, with the proviso, however, that the said annual royalties may in no case be less than two hundred and eighteen thousand seven hundred (218,700) gold francs, the gold franc

being defined as above, it being understood, on the one hand, that the operating State shall continue to bear the costs of new and additional works or replacements effected on the railway and, on the other hand, that, if the amount of the transport taxes in Yugoslavia should be changed subsequent to the date of the present award, the proportion of 22.5 per cent shall be modified in such a way that the ratio of that percentage to the total receipts (including the transport tax) shall remain the same as it was prior to the change in question;

Whereas, lastly, as regards the transport of the mail the grantee of the concession was relieved under paragraph 10 of the concession of the obligation of performing this service free of charge, it being understood that the mail should be paid for at a rate to be fixed by agreement between the Postal Authorities and the railway company; and whereas, though the petitioning company is within its rights in claiming that the contractual clause still holds good, it cannot, on the other hand, plead as against the Yugoslav State the arrangements made for the transport of mail before the war under its agreements with the Hungarian Postal Authorities; and whereas, on this point, the arbitrators have decided that an agreement should be concluded between the Yugoslav Postal Authorities, the State Railways and the petitioning company with a view to fixing the rates to be paid for carrying the mail, the proceeds of which will appear among the receipts forming the subject of the annual settlement of accounts between the State and the company.

#### EXPROPRIATION OF THE BARCS-PAKRAC RAILWAY

Whereas, the Rome Agreement, which substituted the States having taken over operation of the lines of the former Südbahn Company in regard to the latter's rights and obligations under the lease and operating contracts which it had concluded with other railway administrations, also stipulated in Article 2 that none of the States concerned should be entitled to exercise the right of expropriation in respect of the lines of the aforesaid company as long as the agreement remained in force—that is to say, until December 31, 1968, on which date the concession was to come to an end together with the operating contract concluded between the Südbahn Company and the petitioning company, and whereas, such being the case, expropriation is not at all indispensable for the purpose of administrative and technical reorganization and the petitioning company is therefore within its rights in arguing that it should be afforded an opportunity of improving its position in the event of a future increase in the railway's receipts so as to offset part of the sacrifices which it has had to make in consequence of the fact that the losses arising out of the war and the present economic depression have been jointly borne by the grantee and the operating authority, the arbitrators feel bound to decide that the Hungarian State and the Yugoslav State shall not be entitled to expropriate the Barcs-Pakrac Railway before December 31, 1968;

and whereas, in the event of the Yugoslav State's deciding to proceed to expropriation either on that date or between then and November 4, 1975, on which date the railway's concession is to terminate, the Hungarian State shall also be required to expropriate that part of the system which is situated in its territory and to transfer all its rights of property in that section of the line to the Yugoslav State, subject to the payment by the latter of the whole of the expropriation annuity to the petitioning company;

Whereas, for the purpose of fixing the conditions to govern such expropriation, the arbitrators are not bound either by the provisions of pre-war Hungarian legislation or by the contractual provisions originally applicable to the Barcs-Pakrac Railway; and whereas, in the event of expropriation, the annuity may be fairly fixed at a sum equal to the average annual royalties paid to the company in respect of the five most successful of the last seven completed years preceding the date of expropriation.

AS REGARDS THE PAYMENT OF THE INDEMNITY TO BE ASSIGNED TO THE PETITIONING COMPANY IN RESPECT OF THE PERIOD JANUARY 1, 1923, TO DECEMBER 31, 1934, AND THE SETTLEMENT OF THE ANNUAL ROYALTIES

Whereas, in regard to the first point, the arbitrators, after due consideration of all the facts of the case, have thought it desirable to direct that the indemnity of three million seven hundred and eighty thousand four hundred and forty-four gold francs (3,780,444 francs) awarded above shall be converted at the rate of 3.50 per cent per annum into forty-one annual payments of one hundred and seventy-four thousand six hundred and fifty-six gold francs (174,656 francs), the first payment to be made on December 31, 1934, and the last on December 31, 1974;

Whereas, in regard to the second point, the Yugoslav State shall pay to the petitioning company, in equal moieties on June 20 and December 20 of each year as from January 1, 1935, a minimum sum in respect of royalties of two hundred and eighteen thousand seven hundred gold francs (218,700 francs), the surplus, if any, being paid after the annual settlement of accounts and at latest on September 30 of the year following the close of the year of operation;

AS REGARDS THE COSTS OF ARBITRATION

Whereas, having regard to the facts of the case, the costs of arbitration as shown in the Annex should be borne in equal shares by the Yugoslav State and the petitioning company, the Royal Hungarian Government being subsequently repaid the advance which it was called upon to make under our aforesaid decision of March 21, 1934;

Have therefore made the following Award:

*Article 1*

The Kingdom of Yugoslavia shall pay to the Barcs-Pakrac Railway Company, Limited, of Budapest, forty-one annual payments each of one

hundred and seventy-four thousand six hundred and fifty-six gold francs (174,656 francs), the term gold franc being used to mean the gold currency of the weight and fineness adopted by the Latin Union (Convention of November 6, 1885)—that is to say, the twentieth part of a gold coin weighing 6.45161 grammes of a fineness of 900/1000ths.

The above-mentioned payment shall be made, without application or demand on the part of the company, on December 31 of each year, the first payment being due on December 31, 1934.

#### *Article 2*

The Kingdom of Yugoslavia shall pay to the Barcs-Pakrac Railway Company, Limited, for the use of the aforesaid railway and its appurtenances, an annual royalty equal to 22.5 per cent of the gross operating receipts of the aforesaid railway as shown in the annual statements communicated, in the six months following the close of the financial year, to the legal representative which the company shall be required to appoint in Yugoslavia.

The said annual royalty shall in no case be lower than two hundred and eighteen thousand seven hundred gold francs (218,700 francs). The said minimum royalty shall be paid in two equal moieties on June 20 and December 20 of each year. Any surplus revealed by the annual statements shall be paid by September 30 of the year following the close of the financial year under consideration.

For the purpose of compiling such annual statements, the passenger and goods traffic of all kinds carried on the Barcs-Pakrac Railway system shall be assessed in respect of the distance actually travelled on that system on the basis of the local tariff laid down by the Yugoslav State.

Should the amount of the Yugoslav transport tax be changed subsequent to the date of the present award, the proportion of 22.5 per cent shall also be modified in such a way that the relation of that percentage to the total receipts (including the transport tax) remains the same as it was prior to the change in question.

#### *Article 3*

The Yugoslav State, being the authority responsible for operating the Barcs-Pakrac Railway, shall continue to bear the costs of all new or additional works and replacements which it may see fit to carry out on the railway.

#### *Article 4*

It is hereby stipulated that an agreement shall be concluded between the Yugoslav Postal Authorities, the Yugoslav State Railways and the Barcs-Pakrac Railway Company, Limited, for the purpose of fixing the rate to be paid for the transport of mail on the aforesaid railway, the proceeds of which shall be included in the annual statements of operating receipts mentioned in Article 2 above.

*Article 5*

The Yugoslav State shall not be entitled to require the petitioning company to resume operation of the railway before the end of the concession of the Barcs-Pakrac Railway.

Should the Yugoslav State avail itself of its rights under Article 13, § 4, of the Rome Agreement to retransfer the operation of its lines to the Danube-Save-Adriatic Railway Company (formerly the Südbahn Company), the aforesaid company shall be substituted for the Yugoslav State in regard to the operation of the Barcs-Pakrac Railway and shall pay in its stead the royalty due to the petitioning company and fixed in Article 2 above.

*Article 6*

The Hungarian State and the Yugoslav State shall not be entitled to proceed to expropriation of the Barcs-Pakrac Railway before December 31, 1968.

If between that date and the end of the concession the Yugoslav State should decide to proceed to its expropriation, the Hungarian State shall also expropriate that section of the line which is situated in its territory and shall transfer its rights to the Yugoslav State, subject to the payment by the latter of the entire expropriation annuity.

The aforesaid annuity shall be equal to the average of the annual royalties paid to the petitioning company in pursuance of Article 2 above in the five most successful of the seven last completed years preceding the date of expropriation.

*Article 7*

The other claims put forward in the petition of the Barcs-Pakrac Railway Company, Limited, are rejected.

*Article 8*

The costs of arbitration as shown in the Annex shall be borne in equal shares by the Royal Government of Yugoslavia and the Barcs-Pakrac Railway Company, Limited.

*Article 9*

The present Arbitral Award shall be notified to the Royal Government of Hungary, to the Royal Government of Yugoslavia and to the petitioning company by the Secretary of the Arbitral Board. The original shall be given into the charge of the Secretary-General of the League of Nations for safe keeping.

DONE in Paris the fifth day of October, One thousand nine hundred and thirty-four.

(Signed) J. G. GUERRERO, A. POLITIS, MAYER.

## ANNEX

The expenditure entailed by the Arbitral Award rendered on October 5, 1934, is hereby fixed at twenty-two thousand nine hundred and seventy-three Swiss francs, sixty-five centimes (22,973.65). That total includes the arbitrators' honoraria, which were fixed at twenty thousand Swiss francs (20,000).

These costs shall be borne in equal shares by the Royal Government of Yugoslavia and the Barcs-Pakrac Railway Company, Limited, as provided in Article 8 of the operative part of the aforesaid Award.

The Royal Hungarian Government shall be repaid the advance which it was called upon to make under our decision of March 21, 1934.

DONE in Paris the fifth day of October, One thousand nine hundred and thirty-four.

(Signed) J. G. GUERRERO, A. POLITIS, MAYER.

## BOOK REVIEWS AND NOTES \*

*Tratado de Direito Internacional Publico.* By Hildebrando Accioly. Rio de Janeiro: Imprensa Nacional, 1934. Tomo II, pp. viii, 487.

In his second volume Dr. Accioly, since the summer of 1934 Minister of Brazil at Bucharest, continues the scholarly exposition of the principles of public international law begun in Volume I, which appeared in 1933 and was reviewed in this JOURNAL, Vol. 28, p. 615. Volume III, just off the press, will be reviewed later. Property of states and pacific relations are the subjects of Volume II. Under property the author includes territory, vessels and aircraft, and under pacific relations he deals with the organs and agencies of interstate relations, juridical obligations and international agreements. Treaties are covered in almost one hundred pages. The failure of one party to execute the terms of an agreement does not in itself nullify the treaty, Accioly maintains; the other party must make an express declaration that it considers itself released from the obligation.

Fluvial dominion is discussed in the light particularly of the practice of Brazil and other South American countries with additional examples from Europe. Differing with Fauchille and others who hold that even though a state may be the proprietor of a national stream it cannot use its sovereignty to bar other states from access, Dr. Accioly is of the opinion that although it is frequently to the interest of a state to open its streams to foreign commerce, nevertheless this action might at times be inconsistent with the state's safety and there is no rule of international law that makes opening mandatory. Positive international law still remains in an inchoate state with reference to the free navigation of international rivers, whether contiguous or successive, the writer says, but the tendency is toward liberty of navigation, qualified by the interests of the riparian states. With respect to the Amazon and its tributaries Brazilian doctrine has been unvarying: freedom of navigation has been granted to upper riparians like Bolivia, Colombia, and Peru, but conditional upon a previous agreement with Brazil.

FREDERIC WILLIAM GANZERT

*Private International Law.* By G. C. Cheshire. New York: Oxford University Press; Oxford: Clarendon Press, 1935. pp. lx, 584. Index. \$8.50.

This new treatise deals with the English system of Private International Law. It does not attempt to set forth the principles of an actual or poten-

\* The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—ED.

tial universal system. A new approach to the English system is timely because of the many new problems presented to English courts within recent years. The author finds that English courts have been often prone to adopt some plausible principle without serious investigations of its merits and without considering what the effect will be if applied to a case with slightly different facts (p. viii).

Although American cases are not frequently referred to, the author has been influenced by some practical applications made by American courts to reconsider rules considered settled in England. Thus, he attempts to draw a distinction between status and capacity. Westlake referred to the status as "the sum of the particulars in which a person's condition differs from that of the normal person." But the author resists the tendency to apply a single system, namely, the law of the domicile, to determine capacity in every case, and gives credit to the practical advantages of the established American rule of the *lex loci contractus*, at least in respect to mercantile contracts. He is at considerable pains to show (pp. 144-152) that English decisions apparently to the contrary were *dicta*; but his references to English cases in support of the proper rule are too meagre to be relied upon as final.

The famous *renvoi* doctrine is discussed in the author's long chapter on Domicil (pp. 84-141). It might have been more advantageous to give this topic independent consideration as it is by no means restricted to cases in which domiciliary law is applicable. The author's treatment is enlightening but he does not take a firm stand, as some other English writers have done, against the application of the foreign system of private international law where foreign law is indicated. This is doubtless due to the perplexity imported into the problem by recent decisions of the English courts, which justify the author in saying that it is left to the foreign law to decide what legal system shall furnish a solution of the matter in issue (p. 139). This is directly contrary to the principle adopted by the Restatement of the Conflict of Laws (§ 7b) under the auspices of the American Law Institute.

Other points of difference between English and American doctrine in this field are pointed out, such as, for example, that a foreign tort creates an obligation enforceable in the forum even though not actionable according to the *lex fori*. English law represents a much more restrictive view. The English cases relating to jurisdiction for divorce are not comparable with American decisions, as under English law it is impossible for the wife to acquire a different domicile from that of her husband. The author is fully aware of the injustices which are thus made possible (p. 268) but the problem is substantive and not one of private international law.

Dr. Cheshire has written an admirable treatise upon a topic which he himself well describes as "fluid not static, elusive not obvious."

ARTHUR K. KUHN

*Japan's Pacific Mandate.* By Paul H. Clyde. New York: Macmillan Co., 1935. pp. xii, 244. Index. \$3.00.

This is an excellent volume, giving a description of the islands, their location, physical characteristics and resources, as well as of the social and economic conditions of their inhabitants.

The author, at the invitation of the Japanese Government, spent the months of March and April, 1934, visiting various portions of the mandate. He assures us "he was afforded every opportunity by officials of the mandatory government to see and to examine Japan's administration and to gain some acquaintance with the nature of the islands and the character of their native peoples. His actions and itinerary were restricted only by the sailing schedules of the Japanese cargo vessels on which he travelled." (p. vi.)

Japan appears to be conscientiously carrying out the terms of the mandate. Professor Clyde found no evidence to justify the rumors that Japan was fortifying the islands. 1,400,000 Yen have been spent in improvement of the harbor at Saipan. In case of war it would no doubt be used for naval and military purposes, but the real object of the construction is commercial. The most interesting industrial development is the production of sugar. The acreage of cane-planting in 1916 was but 48. In 1934 it had grown to 22,800. The export of sugar in 1932 to Japan was valued at 9,605,000 Yen. As a rule, no natives are employed in this enterprise. The laborers are chiefly Japanese subjects from the Liu Ch'iu Islands. (p. 136.)

The education of the young is being promoted and financial support is given to the work of the missionaries, since religion is regarded as a support to morality. Three-fifths of the inhabitants are Christian. High praise is given to the medical work of the Japanese Government.

Chapter XII is devoted to the discussion of two questions: "(1) Where does sovereignty in a mandate reside? and (2) Does resignation from the League of Nations by a mandatory power involve the surrender of its mandate?" In an attempt to answer the first question, the author tells us, "some ten different theories have been put forward."

The second question has not been raised in such form as to require an answer.

E. T. WILLIAMS

*Diplomatic and Consular Laws and Regulations.* By A. H. Feller and Manley O. Hudson. Washington: Carnegie Endowment for International Peace, 1933. 2 vols. Index. \$5.00.

The codification of those branches of international law pertaining to diplomatic and consular practice has received considerable attention at the hands of publicists. The Pan American Conferences and the League of Nations have also made definite and valuable efforts in the same direction. This exhaustive collection of diplomatic and consular laws and regulations of various countries is an invaluable adjunct to these draft codes and should serve as an essential source of information to all subsequent attempts at

codification. In fact, the collection was originally compiled in connection with the work being done by a group of research associates under the auspices of the Faculty of the Harvard Law School.

Inasmuch as the publication of all the diplomatic and consular laws and regulations of all the sovereign and semi-sovereign states of the world would have made an unnecessarily cumbersome and repetitious collection, the authors have felt it necessary to set up certain canons of selection. All fundamental laws and regulations regarding the organization and functions of the diplomatic and consular services of each state will be found given *in extenso*. In the same way provisions relating to the status of foreign diplomatic officers and consuls have been given in full. On the other hand, detailed administrative provisions are omitted or substantially abridged.

The scholar desirous of following the history of the development of national legislation pertaining to either the diplomatic or consular service would find a rich mine of information. For instance, Colbert's famous marine ordinance of 1681, which vies with certain decrees of the Netherlands as being the first national legislation as regards consuls, is given in part. The principal provisions of the Act of April 14, 1792, the first legislation of the Federal Government of the United States on the subject of consuls is also given.

The whole subject of national laws regarding diplomatic privileges and immunities might be studied from a comparative standpoint from the material available in the volumes. Certain interesting practices, such as the granting of an identity card by the Turkish Bureau of Protocol to members of foreign embassies and their families, would be noted.

A valuable addition to the texts of the laws of each state is the preliminary editors' note giving a brief historical sketch of the development of legislation for diplomatic officers and consuls in that country, together with bibliographies of primary and secondary materials on the subject. An appendix gives a list of all consular treaties, and commercial treaties which contain consular clauses of more or less general interest. The authors have made a valuable contribution to knowledge in the field of diplomatic and consular practice.

GRAHAM STUART

*La Visite des Convois Neutres.* By E. Gordon. Paris: A. Pedone, 1935. pp. 120. Fr. 25.

This monograph on neutral convoys is a brief but extremely competent piece of work. It is a model of conciseness, intelligent organization, lucid presentation and ample documentation. The subject is one which should have an important place in considering the problem of neutrality. M. Gordon, in his preliminary historical survey, shows that the convoy originated as a device for protection against pirates, just as merchants on the eastern overland routes sought protection in caravans. In the modern sense of a neutral's substitute for the exercise of the belligerent right of visit and search, M. Gordon dates the practice from the Edict of Queen Christine of

Sweden, August 16, 1653. He shows how the various states of Europe during the next century and a half wavered back and forth among positions of sharp assertion, acquiescence and opposition. Such inconsistency, in fact, is evident with reference to most of the rules regulating neutral and belligerent rights. As usual, however, Great Britain is most nearly consistent in opposing this neutral pretension.

The Armed Neutrality of 1780 supported the principle that neutral convoy afforded immunity from belligerent search and secured the temporary acquiescence of both France and England. But Russia deserted the cause and Sir William Scott in *The Maria, Paulsen*, lent strong judicial support to the English opposition. When the Second Armed Neutrality of 1800 sought to reassert the principle, England countered with embargoes and the bombardment of Copenhagen, securing in 1801 a favorable compromise in treaties with Russia and other states.

As M. Gordon brings out clearly, the fundamental difficulty underlying the convoy principle, is the disagreement on the substantive rules of neutral rights. This was graphically illustrated at the London Naval Conference of 1908-09. When agreement was reached on contraband and blockade, Great Britain accepted the convoy principle. The point is not so much a distrust of the certification of the convoying neutral warship—though M. Gordon points out many cases of abuse—as it is the fact that when the convoyer asserts no contraband is carried by the convoyed vessels, he has in mind a definition of contraband which may differ widely from that of the belligerent. The same is true regarding blockade, unneutral service and the like. M. Gordon notes that on the opening of the World War, despite the rejection of the Declaration of London, the right of convoy seems to have been admitted by practically all states and even after the new decrees of July, 1916, France, Italy, Japan, Rumania, Russia, Germany, Austria-Hungary, and later, China and the United States, still held that view. Great Britain was again in opposition.

In Part II of his study, M. Gordon analyzes carefully and with great fairness, the arguments *pro* and *con*. On the several questions of detail, he marshals the evidence of state practice in the form of decrees, ordinances, etc., and then summarizes the views of the writers. He admits that there is considerable justification for the British point of view so long as basic disagreement on the substantive rules persists. He suggests by way of solution, that the belligerent have the right to examine, on board the convoying vessels, the papers of the convoyed merchantmen. The trustworthiness of the papers themselves would be guaranteed by the neutral government. If the papers show that the convoyed vessels are carrying what the belligerent considers contraband, or that they are otherwise, *according to the theories maintained by the belligerent*, good prize, the convoying vessel shall not resist their capture. It is then for the prize court to pass judgment. The author admits this plan would not give complete satisfaction, but soundly argues

that it would be of some help to neutral commerce, which would in many cases avoid being forced to deviate to a belligerent port. M. Gordon, however, has not attempted to discuss the submarine problem. If belligerents are permitted to continue to use neutral colors as a *ruse de guerre*, the submarine would fear to visit the neutral convoy lest some new type of "Q-Boat" be garbed in the appearance of a neutral warship.

The problems of neutrality are legion. Their several aspects need just the type of scholarly and lucid analysis with which M. Gordon has treated the convoy question.

PHILIP C. JESSUP

*Staatslehre*. By Hermann Heller. Leiden: A. N. Sijthoff, 1934. pp. xvi, 298. Fl. 5.25.

In this great work, the author, who died at an early age and under tragic circumstances as a refugee in Madrid, gives his theory of the State, a theory which stands, so to speak, between Kelsen's normative "pure jurisprudence" and C. Schmitt's fascist theory of pure power. Here only a short survey of Heller's attitude toward international law can be given; with this problem he deals only incidentally, for death prevented him from carrying out the whole plan of the book.

Since, according to the author, every juridical order is justified only by meta-positive principles of law, the "general principles of law, recognized by civilized nations" in Article 38 of the Statute of the Permanent Court of International Justice are not a source of international law on the same plane with treaties and custom, but form the very basis of the whole international law. The fact that no society is absolutely homogeneous makes the formation of an organization-unit through the mere psychological will of all impossible; international law, with its basic rule of unanimity must, therefore, necessarily lead to a rudimentary development, to unsatisfactory results and to constitutional weakness. Coöperation of men presupposes a legal power, authorized and able to enforce the law against recalcitrant subjects. It is exactly this organized physical compulsion which is lacking in international law; in such circumstances the normativity is at the mercy of the factual actions of the State-organs. Certainty of the law is only possible through a monopoly of legal physical compulsion in favor of the organized community and exclusion of the methods of self-help, on which international law has, to a large extent, to rely. If the non-organized compulsion of society—*e. g.*, public opinion—fails, the validity of international law is based on nothing but the political situation, determined by interests, and the good, *i. e.*, law-abiding will of the highest organs of the State. But this situation is by no means an anomaly in international law; exactly the same is true in constitutional law, with regard to the summit of the State-organization.

JOSEF L. KUNZ

*International Security: The American Rôle in Collective Action for Peace.* By Philip C. Jessup. New York: Council on Foreign Relations, 1935. pp. xxiv, 157. Index. \$1.50.

This study was prepared for submission to the Eighth International Studies Conference, which met in London in June, 1935, to consider the question of collective security and was done under the general direction of a committee of which Allen W. Dulles was the chairman and the author the *rapporteur*. It is divided into two parts: (1) Historical Summary of the Attitude of the United States from 1919 to 1935, and (2) Possible American Contributions to Collective Security. In the first part Dr. Jessup considers the history of the American relation to the cause of the stabilization of peace under the headings of: the League of Nations, the Briand-Kellogg Pact, Disarmament, Consultation, Arbitration and Conciliation. In the second part the author discusses "*What Might the United States Promise to Do*" with regard to Non-Aggression Pacts, Disarmament Conventions, Consultation, Sanctions, Arbitration and Conciliation, and he finally undertakes to prophesy "*What Will the United States Do*" under the two heads of Neutrality and Consultation.

In his survey of American reactions to various plans and proposals which have been put forward in the last 15 years with a view to improving the means for preventing war, the author concludes that "although there has been a very great change in the official American attitude toward the League, it is believed that this change has not extended to the point of acceptance of the idea of full League membership." (p. 23.) He considers that "the opposition to American adherence to the World Court was largely tied up with opposition to membership in the League of Nations and in many instances was supported by such irrelevant arguments as opposition to the cancelling of the war debts, opposition to the reduction of tariffs, opposition to entangling political alliances. . . ." (p. 31.) Dr. Jessup is of the opinion that "nothing since 1919 relating to international affairs had so fired the imagination of the American people as the multipartite treaty for the renunciation of war." (p. 37.) However, he does not think that "the majority of people in the United States believed that war had been effectively outlawed: there is too much shrewdness and cynicism in the American make-up to permit so trusting an acceptance." (p. 41.)

In his Conclusion the author points out that "the 'stabilization of peace' is not synonymous with 'freezing the status quo'" (p. 148). He considers that "the United States is not yet prepared to play a full rôle in world affairs." (p. 148.) He recapitulates certain contributions in treaty form which the United States had made or stands ready to make: conclusion of disarmament conventions applicable to land, air and sea forces; conclusion of a convention to regulate and limit the traffic in arms; conclusion of some general agreement regarding neutral rights and duties. (p. 150.)

This very clear, concise and scholarly survey of the foreign relations of the United States since the armistice and interesting critique of possible action

in the future, is particularly timely and welcome. While the author is somewhat apologetic concerning the course pursued by his country, yet he concludes that the attitude of the United States cannot be said to be wholly negative, and he ends with the following note of challenge: "If the other governments of the world believe that peace could be further stabilized by the acceptance of existing American offers, express or implied, the road is open and they may take the initiative." (p. 152.) FRANCIS COLT DE WOLF

*Grundfragen der völkerrechtlichen Rechtsfähigkeit und Handlungsfähigkeit der Staaten.* By Heinrich Korte. Berlin-Grunewald: Verlag für Staatswissenschaften und Geschichte, 1934. pp. xvi, 190. Rm. 11.

This is a study of the conceptions of "international personality" (Rechtsfähigkeit) and "international capacity to act" of the States. First the author investigates the relation of these two conceptions with the conceptions of "membership in the international community," of "recognition" and of "sovereignty." There the study of these two conceptions leads the author to deal extensively with the different forms of unions of States and with the legal figure of the permanently neutral State.

It is an ambitious study, which not only reviews a good deal of the literature on every particular problem, but which attempts to base this theoretical study on a broad foundation of philosophy of law. The author is, in spite of his opposition, influenced to a great extent by the ideas of the "Vienna School." His assertions of the autonomous character of international law, of its character as a "law of coördination," of the constitutive character of recognition are contradicted by his own statements. The problem of the supra-ordinated, necessarily heteronymous character of every legal order, and therefore of international law, must not be confused with the completely different problem of the procedure of creation of a legal order. The author is opposed to the "primacy of international law." But he admits that there are rules of international law not based upon the consent of the States; he admits that the States are subordinated to international law; he denies the possibility of absolute sovereignty, because "the law presupposes subordination to the law." But that is exactly all that the "primacy of international law" means. And these concessions of the author are logically necessary because he affirms the existence of an international legal community, because he fully recognizes the legal character of international rules, because he is opposed to the philosophy of Hegel, according to whom the sovereign State is an ultimate value, "the realization of the moral idea."

JOSEF L. KUNZ

*Manchuria, Cradle of Conflict.* By Owen Lattimore. Rev. ed. New York: Macmillan Co., 1935. pp. xx, 343. Index. \$3.00.

This able work was written just before, and issued just after, the outbreak of the Sino-Japanese conflict in September, 1931. In its revised form it differs from the first edition only by the addition of two chapters entitled

"Manchukuo: the State and the Theory" and "Pacific Ocean and Great Wall." The entire work, including the two added chapters, is entirely an interpretative one, with scarcely a mention, and certainly not a description, of any events that have occurred. It thus seeks to supply an understanding of conditions in, and relating to, Manchuria which will enable one to appreciate the reasons for, and the significance of, the recent happenings in China's Eastern Provinces. This purpose is admirably performed. The very great part played for centuries by these areas in Chinese history is made plain; the significance of the distinction between the Mongols and the Manchus is shown; and the extent to which the latter had become essentially Chinese even before the end of the Ming Dynasty in 1644, while the former, even to the present day, have resisted the civilization of China, is emphasized. Especial attention is also directed to the influence of Western upon Eastern civilization and to the part that this conflict of cultures may be expected to play in the future of Manchuria.

Japan, says Mr. Lattimore, is now essentially a Western nation. Westernization in that country is not a veneer. It has, he says, affected Japan too vitally to be called merely superficial. This is not true of China. "While the power of many Western inventions has been recognized, and the profit to be realized from many Western methods, no single quality of the West, no subjective conviction, has truly appealed to the Chinese. The Western style, for the Chinese, reveals no new dispensation, nor any opening up of fresh and desirable or morally superior worlds of inspiring possibilities. There is nothing in it that, from the standard of Chinese spiritual values, it would be disgraceful to go without." China, Mr. Lattimore says, is willing to use Western methods only as a means of holding off the aggressions, political and cultural, of the West, and this, he declares, is of profound importance in the frontier problems of Manchuria, Mongolia and Chinese Turkestan. Mr. Lattimore has much to say of the "frontier" influence of Manchuria upon China, as having been profoundly different to that exerted by the former frontier portions of the United States upon its more developed areas. The argument, however, is one that cannot be summarized within the space of a short review.

The present work needs to be read in connection with its author's earlier volumes *The Mongols of Manchuria*, and *The Desert Road to Turkestan*. Taken together, these three volumes, based as they are upon an intimate personal knowledge, and illumined by a keen appreciation of the meaning of things seen, are of outstanding value to those who seek the significance of recent events in Northeastern Asia.

W. W. WILLOUGHBY

*Islands völkerrechtliche Stellung.* By Ragnar Lundborg. Berlin-Grünwald: Verlag für Staatswissenschaften und Geschichte, 1934. pp. viii, 134. Index. Rm. 14.

For thirty years Dr. Lundborg of Sweden has been a student of the rela-

tion of Iceland to Denmark and to Norway. With considerable regularity he has published articles on the subject. In this book he supports the almost unanimous view of Icelandic writers in opposition to the views of several Danish writers. He presents the thesis that from 930 A.D. to the present Iceland has maintained itself as a sovereign state. During this period Iceland has made two important treaties. The treaty with the King of Norway in 1263 made Iceland an hereditary monarchy with the same individual as King of Iceland and King of Norway. After the Union of Kalmar, 1380, the same relationship continued with the sovereign of Denmark.

The second treaty is that of 1918 with the King of Denmark. Prior to the negotiation Denmark recognized the independence of Iceland. The treaty specifies that the two are sovereign states with a king in common who carries in his title the names of both states. Citizenship is separate; but Danes enjoy the same rights in Iceland as Icelanders and reciprocally the Icelanders in Denmark enjoy the same rights as Danes; inshore fisheries are specifically included. Commerce is placed on the most favored nation basis. Iceland expresses the desire that Danish diplomatic and consular officers should administer its foreign affairs in accordance with instructions prepared by the Government of Iceland. If Iceland should desire to accredit its own delegates on a particular mission at its own expense, it may do so upon giving notice to the Danish Ministry of Foreign Affairs. In 1934 Iceland did thus commission its own attaché in the Danish legation at Oslo.

Treaties to which Denmark had become a party prior to 1918 were to be binding on Iceland. Treaties negotiated thereafter would require the adhesion of Iceland. Moreover, treaties could be negotiated that would bind Iceland alone. About twenty such treaties have been made. Iceland declared itself to be a neutralized state; Denmark recognized it as such and agreed to notify the other Powers. Dr. Lundborg furnishes a commentary upon each one of the provisions.

The minority party in Iceland has announced as its objective the abolition of the kingship and the assumption of complete control over foreign affairs. However, Dr. Lundborg estimates that the present state of public opinion in Denmark and in Iceland would indicate that the treaty is satisfactory.

CHARLES E. HILL

*Foreign Bondholders and American State Debts.* By Reginald C. McGrane. New York: Macmillan Co., 1935. pp. xii, 410. Index. \$4.00.

This volume gives a nation-wide view of those sixteen American debtor commonwealths which have passed through periods of delinquency or delinquency and repudiation—five northern (Pennsylvania, Indiana, Illinois, Michigan, Minnesota) and eleven southern (Maryland, Virginia, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas). Of the northern group, two repudiated; of the southern group, the last eight states listed above. The delinquencies and

repudiations are traced through the period 1830-70 to their final settlements with bondholders, leaving debts of the eight repudiating Southern States still outstanding today.

The author has sifted many volumes of source materials at home and abroad; in the foreign materials are included the reports—and the active assistance—of Baring Brothers of London and Hope and Company of Amsterdam, both of which houses have had long and painful experiences with American public bonds. The author has made this study in economics and public finance in a full, accurate and probably final way—a service very long needed in a question where such ignorance, confusion, and unreasoning resentment have been the rule. His treatment throughout is always scientific and fair. Those bonds sold before the Confederate War and the bayonet bonds of war and reconstruction are very carefully separated. Professor McGrane gives a clear, full treatment of the effects of various defalcations and repudiations on American credit, both state and national, in money markets abroad. Legislative and executive methods in the sixteen states are portrayed from materials drawn from their authentic political history, and the careless, stupid, and corrupt methods—in notorious violation of statutes and constitutions—are detailed with an impartial hand.

In the matter of redress, judicial or political, for the foreign bondholders—or the lack of redress—the book is less satisfactory. The various judicial decisions of state or national courts are given rather brief analysis; the titles of principal cases are often omitted entirely, though the page references to reports are supplied. The suability of repudiating states in their own or federal or international tribunals is not sufficiently explored; only a brief mention is made of the Monaco case, decided unanimously in favor of Mississippi by the Supreme Court in May 1934. The vital point in the whole question has been the denial of justice, actual or alleged, for the bondholders.

Nevertheless, this study is a substantial and convincing contribution to the economic and political truths in this embittered and perennial question.

BESSIE C. RANDOLPH

✓ *The Juristic Status of Egypt and the Sudan.* By Vernon A. O'Rourke, Baltimore: Johns Hopkins Press, 1935. pp. 184. Index. \$1.50.

The subject of *sovereignty* has perturbed political scientists very much as the subject of *grace* has preoccupied the theologians. Both subjects seem to have a fatal attraction to lure one into bypaths and labyrinths.

Sovereignty, to many, is the touchstone by which to test the exact political status of states in international law. But the principal difficulty is to reach a substantial agreement concerning the precise meaning and scope of sovereignty. One is tempted to paraphrase Shakespeare by asking: "Where is sovranity bred, in the heart or in the head? How begot, how nourished?"

The answer is about as elusive, and one is inclined to believe that the concept of sovereignty as a reliable test of the rights and obligations of states under international law is perhaps very much of a "fancy," or *ignis fatuus*.

Dr. O'Rourke, in his extremely interesting monograph concerning The Juristic Status of Egypt and the Sudan, most unfortunately has gone aground on the treacherous shoals of sovereignty. Without achieving a clear-cut definition of sovereignty, his analysis of the facts of the situation rather compels the conclusion that one must find some other criterium by which to judge such political abnormalities as Egypt, Morocco, Syria, Palestine, and Manchuria. The status of Egypt unquestionably presents a difficult and fascinating problem. It is a most anomalous and abnormal situation. As for the Sudan, its proper classification is baffling.

So extraordinary are these two problems of Egypt and the Sudan that they defy ordinary methods of analysis. In view of the inability of political scientists to establish an absolute norm of sovereignty by which to test all international political entities, it would appear desirable to apply the reverse method. Why not test theories of sovereignty by just such concrete instances as Egypt and the Sudan? May we not be constrained to revise any prepossessions we may have respecting this mysterious and sacred political tenet?

The writer of this comment is inclined to believe from his reading of Dr. O'Rourke's monograph that a different conception of sovereignty may have to be evolved to meet just such "psychopathic" cases of "impaired" sovereignty, of "qualified" independence under international law. He ventures to suggest the thought that from the external point of view, sovereignty might properly be considered as primarily a question of *ownership* or *title*. Whether dealing with a political entity such as Ireland, Egypt, or Manchuria, is not the real basic problem "who is the owner?" Whatever the outward form of the state, a protectorate, dominion, dependency, mandate, or other anomaly, the fundamental issue would seem to be whether the people of the territory concerned have the *consciousness* of being its actual *owners*. If they have this consciousness, this conviction, then any limitations on their freedom of action as an independent state should be deemed to be of a temporary character, as a stage in its political evolution. The analogy readily suggests itself of the relationship of guardian and minor. The former does not function by his own right, but merely for the better protection of the minor and of his interests.

Still another analogy comes to mind, namely, the ownership and the control of an automobile. The owner, by reason of a temporary or a prolonged incapacity, may be unable to drive his own car. He may permit another to take the wheel. Or someone may actually usurp the wheel in an emergency. In any case, the ownership of the car should be clearly established, irrespective of the question of actual control.

It is here that Dr. O'Rourke seems to have gone astray. Having found

no substantial agreement on sovereignty as an absolute standard of international independence, he has failed to maintain a clear distinction between the *possession* of sovereignty, and the *exercise* of sovereignty. It may readily be admitted that the temporary and irregular exercise of sovereignty, as in the case of a military invasion, does not imply the transfer of sovereignty. Dr. O'Rourke apparently senses the need of a distinction between the exercise and possession of sovereignty by having recourse to such significant expressions as "Great Britain's paramountcy in Egypt," "complete control," "supremacy," "client state," "Egypt's growing independence," "demand for greater independence from external restraint," "impairing Egypt's independence," "effectively sovereign," etc., etc. What has so confused the problem of Egypt has been undue emphasis on the active *intervention* of England in Egyptian affairs and varying degrees of control both in internal and external matters. There is a tendency to ignore the fact that throughout the political evolution of Egypt, beginning with the rebellion of Mohammed Ali in 1841, the elevation of his successor Ismail Pasha to the rank of Khedive in 1866, the British occupation of Egypt in 1882, the military control of the country by Great Britain during the World War and proclamation of a Protectorate, the conferring on Prince Husein of the title of Sultan, and finally the British declaration of February 28, 1922, recognizing Egypt "as an independent sovereign state," may be discerned a certain national consciousness on the part of the Egyptians. The actual ownership and real possession of Egypt would never seem to have been completely and irretrievably reposed in the hands of Great Britain. That Power, for reasons of its own affecting the safety of the British Empire, has seen fit to claim in varying degrees the *exercise* of sovereignty without ever having the actual *possession* of sovereignty.

Concerning the status of the Sudan from the time of the inclusion of that inchoate domain in 1841 under the control of Egypt, through the successful Mahdist rebellion of 1883, its eventual defeat in 1898, and the creation of a "condominium" or "joint tenancy" over the Sudan by Great Britain and Egypt in 1899, there is no clear evidence of that national consciousness or sense of ownership by the inhabitants of the Sudan which would appear, from the psychological point of view, so essentially significant in determining its political status. It is a situation which calls for clarification, though Great Britain, for its own reasons, may prefer to leave it "definitely ambiguous."

It may be seen that Dr. O'Rourke has presented a most interesting and fascinating series of problems in his monograph. One is challenged to pursue these problems in order to attain a clarification of the troublesome theory of sovereignty itself. Any work which succeeds in creating difficulties and doubts is certainly to be commended, even though the author may not have been able to indicate the right solution.

PHILIP MARSHALL BROWN

*La Mandchourie et le Conflit Sino-Japonais devant la Société des Nations.* By A. R. Tullié. Paris: Recueil Sirey, 1935. pp. iv, 379.

The author declares his work to be one of good faith. Placing aside his instinctive sympathies and prepossessions, his aim, he says, is to seek truth humbly and loyally by a prolonged and methodical effort. He devotes 230 pages to an examination of the conditions leading up to the Japanese military invasion of Manchuria, beginning on the night of September 18, 1931, 90 to the controversy before the League, and 25 pages to some general conclusions. In result, he finds that the Commission of Enquiry of the League, whose findings were accepted by the Assembly of the League in its report of February 24, 1933, erred in almost every respect as to the essential facts involved in the controversy, or, at least, as to the significance to be attached to such facts; that Japan had no option but to resort to arms; that all her subsequent military operations were necessitated by the "provocative" acts of the Chinese; and that the various pleas of justification for her actions advanced by Japan were all good in morals as well as law. China, he says, was thus, from the beginning, and throughout the controversy, 100 per cent. in the wrong, and the members of the League, to an almost equal extent, were mistaken in their judgments. Manchuria was never an integral part of China; the anti-Japanese boycott was an undeclared war waged by China against Japan; the Chinese inhabitants of Manchuria desired the establishment of the independent "State of Manchukuo"; and the recognition of that "State" by Japan was not in violation of any general principles of international law or incompatible with any treaties to which Japan was a signatory. Japan provides in Asia "the sole element of order, the only rampart against the debilitating doctrines of Moscow." As for the misguided and maladroit League of Nations, it attempted a task for which it was not intended. "It made an international question of a difference the origin of which was purely local and which could have been easily settled, as proposed by the Japanese Government, by direct negotiations between the Chinese authorities and the Japanese commander." In result, says M. Tullié, the League "has gained nothing either in prestige or power. Its great error was that it believed itself able to play the rôle of a super-State, to control all differences, all conflicts by simple decisions or recommendations inspired by certain absolute principles which should be applied to all peoples and in all cases in spite of the enormous diversities of temperament, mentality, aspirations and interests which constitute the prodigious mosaic of human society. Thus, when it intervened in the Sino-Japanese conflict, with its essentially European outlook, its occidental methods, and its insufficient powers, it foredoomed itself to failure."

W. W. WILLOUGHBY

*Labor in the League System: A Study of the International Labor Organization in Relation to International Administration.* By Francis Graham Wilson. Stanford University Press, 1934. pp. xii, 384. Index. \$4.00.

This is certainly the best balanced account of the International Labor Organization that has appeared up to now. It is inclusive in its coverage of the varied phases of the Organization. It comprises both economic and institutional aspects, its constitutional and juridical nature as well as its social and humanitarian aims and accomplishments. It is an academic, objective and comprehensive survey, well organized and focused, and written with a single and consistent clarity of expression. It is a most useful analysis for the student as well as the more general reader.

The author qualified for his task not only by years of study of original documentary material, but by observation at the central office of the Organization at Geneva and by contacts with those who run the institution. This is said to strengthen the author's claim to competence, not to imply that he has prepared an officialese defense of the Organization. The emphasis is, however, upon the documentary analysis. More personal contacts and longer sojourn and observations at Geneva would no doubt have given more understanding of the larger spirit of the Organization which is frequently lost in the academic precision and orderliness which admittedly and desirably characterize the study.

The title reveals the author's understanding of the institutional nature of the Organization. "Labor in the League System" was in fact the basic and original conception of the nature of the Organization in the minds of the founders. The French text of the Labor Charter—as juxtaposed to the Covenant—speaks of *l'ensemble des institutions de la Société*. Professor Wilson, as far as I know, uses that for the first time in the English properly to describe the Organization and its place among the international agencies at Geneva. He is also correct in emphasizing its administrative nature, its non-sovereign coöperative character which makes it possible to include countries as far apart as the United States and Russia.

The bulk of the volume describes the machinery and functioning of the Organization. The best chapter, however, is Chapter XI on the underlying theories and principles which make the Organization not merely an administrative machine but a vital going concern.

L. M.

*Jus Gentium Methodo Scientifica Pertractatum.* By Christian Wolff. (The Classics of International Law, edited by James Brown Scott.) Oxford: Clarendon Press; London: Humphrey Milford; New York: Oxford University Press, 1934. 2 vols. Vol. I—Photographic reproduction of 1764 ed. pp. lvi, 423; Vol. II, English trans. by Joseph H. Drake. Introduction by Otfried Nippold. pp. lii, 565. Index. \$10.00.

Christian Wolff was perhaps the most influential writer on international law of the eighteenth century. His influence flowed not only from his

reputation in other fields—mathematics, philosophy and theology—, from the voluminousness of his writings, from the notoriety of his philosophical controversies, but also from the logic, completeness and definiteness of his treatise on international law, first published in 1749, as the ninth volume of his *Jus Naturae et Gentium*. This volume was followed in 1750 by the *Institutiones Juris Naturae et Gentium*.

This book does not bristle with quotations and citations as do those of Wolff's predecessors, Gentili, Grotius, Pufendorf and Bynkershoek. Instead, Wolff expresses his conception of the law in a series of brief, logically integrated paragraphs, each followed by an equally brief explanatory note printed in different type. His views on most of the questions of international law discussed at his time and at the present time are there stated clearly and definitely.

While it is evident that Wolff leans heavily upon Grotius, whose name occasionally appears in his commentary, yet he was an original thinker, who did not hesitate to differ from his master on many points. He, however, carried on the tradition of the Grotian school which rested international law upon the two legs of natural law and voluntary law. Thus he restored the equilibrium which had been shifted rather far to the left by the naturalism of Pufendorf and then rather far to the right by the positivism of Bynkershoek.

Wolff insisted, as had Victoria and Grotius before him and as did Westlake and others after him, that the voluntary law of nations required the positing of a community of nations or *civitas maxima*. This led him to recognize the interests of this community, such, for instance, as the general suppression of war, as a factor not less important in the development of international law than the interests of the particular states. Thus he clearly voices the opinion, often expressed officially in recent years, that war ought not to be made against a state willing to submit its case to arbitration (Section 572), and that non-participants in a war may assist him who is carrying on a just war but must not assist him who is carrying on an unjust war (Section 656). In a doubtful case, however, or a case in which the neutral's interest in abstention is obvious, assistance may be refused to both (Section 674).

Vattel tells us that his treatise, which appeared in 1758, originated in a desire to render Wolff into more readable language. He, however, disagreed with his master as to the assumption of a *civitas maxima*, and through the popularity of his writing turned international law in the direction of denying any general interest of humanity as a whole and of developing positive international law entirely from the consent of states. Wolff's opinion on this point is perhaps more widely accepted by international lawyers today than is that of his facile expositor. Agreement cannot provide a basis for positive law unless made within a community whose law requires the observance of agreements.

It is therefore fortunate that students now for the first time have the opportunity to read Wolff himself in English. There was a French translation of the *Jus Gentium* in 1757-8, and the *Institutiones* was translated into both German and French, but American libraries have generally had nothing but the Latin text which repelled modern students.

Dr. Otfried Nippold's biographical and critical introduction treats the subject with enthusiasm and erudition and adds greatly to the value of the work. The Carnegie Endowment for International Peace is to be congratulated on adding this volume to the "Classics." The edition used is that of 1764 and, as is customary in the series, the original text is reproduced in facsimile. The English translation is adequately done by Joseph H. Drake, and the volumes are adorned by two engravings of the author.

QUINCY WRIGHT

*Völkerrecht.* By Ernst Wolgast. Berlin: Georg Stilke, 1934. pp. liv, 302. Index. Rm. 12.

Professor Wolgast, a distinguished international lawyer who has given us interesting monographs, presents here a text-book on the whole international law. The book is enriched by a very valuable systematic list of all collective treaties, a list elaborated by Kurt Rühland. Wolgast's work, written especially for the use of German students, is restricted to the essential things. Its philosophical basis is Tönnies' distinction between "society" and "union." The international community is, according to the author, overwhelmingly "society" rather than "union."

As regards the presentation of the body of rules of international law, we can, with some exceptions, mostly agree. But the most characteristic feature of this treatise is the spirit which pervades it: bitter resentment against the order established by the Versailles Treaty—Lord Snowden's words on the necessity of revising this treaty are the motto of the whole book—and a dogmatic National Socialist credo. The book is, according to the words of the author, "born out of the spirit of the German regeneration," "orientated at the speeches and writings of the Leader."

International law, according to the author, is a law of coördination, based alone upon the consent of the states. It is closely related to politics; it is characterized by its dealing with "dynamic destiny, mysterious and fateful," and by its rule of freedom to resort to war. To prevent war—even if a possible goal of a treaty—is not the meaning of international law and cannot be its meaning. For it is nothing but the normative expression of real situations, the law of the stronger. But its basic principle of the equality of states may render it also a weapon of the weaker state.

Pacifism and the movement *la paix par le droit*, the author asserts, embody a radically wrong conception of the world, defended either by the *beati possidentes*, or by naïve idealists, or by those who make their living from these movements. The veiling of the real facts is due to the growing influence of

women and of men of a feminine mind on public opinion. Nothing has changed in the post-war world. The artificial creation of a law for the prevention of war—due also to an erroneous “over-estimation of the intellectual”—was born out of the desire of the victors to secure the spoils of the World War, does not constitute progress in international law, but is simply Allied foreign policy.

Sovereignty—correctly understood—the author tells us, is the *raison d'être* of the modern state. And he laments that honor and dignity of the state, which have been made the center of politics by National Socialism, are no longer understood: witness the omission of the clause of national honor and vital interests from arbitration treaties. For the states are, as the author tells many times, “those great and dark entities, full of mystery.” The mystic, irrational aspect is stressed: economic things play only a very secondary rôle in the life of states.

The League of Nations is, according to Wolgast, hypocritical cant. The League mandates are “sanctimonious forms of certain cases of robbery”—together with the “war-guilt lie,” “one of the most disgusting chapters of world history.” The Kellogg Pact is only a system of thought, contradicted by the system of real life.

Wolgast is, of course, against “diplomacy by conference”: only bilateral treaties—German-Polish Treaty of 1934. National Socialism, which “understands international law from the point of view of racial jurisprudence,” is a new international principle. The author proposes *e. g.* to begin the rebuilding of the laws of war by treaties between the German and Scandinavian nations, which “have the same sense for European honesty, honor and chivalry.” National Socialism, especially if it should become universal, is perhaps the basis of a new and genuine League of Nations. For, in spite of all bitter criticisms and acid irony, Wolgast insists on the elementary necessity of a higher union above the states, open to the dynamic element and based upon justice.

Wolgast's criticisms are certainly partly true. On the other hand, it is easy to show that he sometimes exaggerates very much; that he, in other cases, resents the things from a highly one-sided standpoint. Further, all statements based on party dogmas must, of course, be wholly unconvincing to him who is not a member of the sect. The violence and sarcastic irony of some comments may sound nearly hysterical in the ears of a citizen of a more fortunate nation. But to the objective mind the reading of this book, written by a scholar and fine thinker, shows the tragedy of Germany, the profound revolt of the nation against the established order. And whoever reads this book, must, even if he completely disagrees with the author, wonder whether there is hope for a real and lasting peace in Europe as long as the strongest nation of the Continent believes itself to be justified in taking such an attitude.

JOSEF L. KUNZ

### Briefer Notices

*Il Requisito dell' Effettività dell' Occupazione in Diritto Internazionale.* By Roberto Ago. (Roma: Anonima Romana Editoriale, 1934. pp. 125. 12 L.) This monograph treats of the effectiveness of occupation of territories. International jurisprudence is divided on that point. After having explained this controversial issue (Chap. 1) the author gives a history of the doctrine (Chap. 2) and of the practice (Chap. 3). In the 4th chapter he develops his own theory. The inchoate title conferred by discovery is to be made final and definitive by a *de facto* relation (*rapporto di fatto*, p. 99). This settlement may assume various forms (p. 109), dependent upon social and economic conditions (p. 106 ff). But an uninterrupted exercise of sovereignty is not necessary (p. 98): loss of *de facto* relations is not abandonment of territorial sovereignty (p. 99 ff). The most important consequence of the author's doctrine is: sovereignty in polar regions has been acquired only as far as *de facto* relations reached at the time of the occupation, a conclusion which coincides fully with that of the reviewer. The author is familiar with the material with which he is working. The legal reasoning is cogent. The book is valuable to anyone interested in the topic which it discusses.

RUDOLF LAUN

*Canada. An American Nation..* By John W. Dafoe. (New York: Columbia University Press, 1935. pp. x, 134. Index. \$2.00.) The growing interest in Canadian-American relations will be encouraged by these lectures given under the Julius Beer Foundation, Columbia University. The lecturer, Mr. John W. Dafoe, enjoys a wide reputation as editor of the *Winnipeg Free Press*, and the same intelligent leadership which he has given to journalism in Canada is evidenced in this study. It displays no scholarly research as in his other books, but his intimate knowledge of political life and public opinion in Canada marks him as an extremely able interpreter. Finding a common foundation in the structures of government in the early American customs, social attitudes and political beliefs, he shows how these inherited beliefs and aptitudes influenced Canadian development particularly with reference to the contribution directly or unconsciously made by the United States.

LIONEL H. LAING

*Internationaler Schutz von Anleihegläubigern.* By Martin Domke. (Wien: Manzsche Verlags- und Universitäts-Buchhandlung, 1934. pp. 60. Index.) The fundamental thesis of this booklet—that there is need of an international institution to consolidate the interests of holders of foreign bonds—is one which has often been discussed in professional journals. Nor is the author's analysis of the shortcomings of existing national organizations, such as the American Foreign Bondholders' Protective Council, very new. Dr. Domke's contribution lies in (1) his effort to define somewhat more closely the characteristics essential to any proposed organization (in this connection he examines some existing international organizations which might be made use of, such as the Bank for International Settlements, the League Loans Committee, and the International Chamber of Commerce); (2) his insistence that the creation of such an international institution is a *sine qua non* for the re-opening of the international flow of capital; and (3) his belief that the Permanent Court of International Justice is well suited to

act as arbiter in most disputes arising between creditors and debtor governments. The fact that the author builds up his case with ample reference to the current problems facing creditors in these depression years and to the opinions and conclusions expressed at the World Economic Conference makes his discussion of the need of an international organization much more convincing than many of the theoretical articles which have appeared heretofore. The gradually increasing body of literature on this subject is evidence both of the pressing nature of the problem and of the inadequacy of the national machinery now available for its solution. It would appear to be but a matter of time before more concrete steps will be taken to effect the new machinery.

WALTER H. C. LAVES

*The Foreign Policy of the Powers.* By Jules Cambon, Richard von Kuhlmann, et als. (New York: Harper & Bros., 1935. pp. vi, 161. \$1.50.) This little volume is a symposium of short essays by eminent foreign ministers or ambassadors of the seven great Powers, in which they attempt to present the fundamental bases upon which their respective foreign policies rest. They originally appeared in *Foreign Affairs* and have now been brought together with a brief introduction by Hamilton Fish Armstrong. Jules Cambon very cleverly bases the policy of France upon security, which requires, as it always has, a balance of power. No mention is made of the rather uneven weighting of the scales since the Treaty of Versailles. In seeking the underlying factors dictating German foreign policy, Richard von Kuhlmann concedes that the problem is difficult because of the recent establishment of the German Reich. Nevertheless, the keystone he finds is Germany's geographical position which for centuries made her the "military highroad, the foraging ground" between Austria and France. Her one policy of safety is "to prevent the formation of powerful new coalitions against herself," and her definition of security includes the maintenance of the world's respect. Sir Austen Chamberlain concedes that the Englishman distrusts logic, and rightly, because men are not governed by logic. He finds that empiricism is the powerful factor in British foreign policy and the method is "muddling through." Nevertheless, he points out that Great Britain's status as an island separated by a very small strip of water from the mainland of Europe, with necessary connections with a wide-flung empire, dictates the basic principles of British foreign policy.

GRAHAM STUART

*International Organization.* By R. Yorke Hedges. (London: Sir Isaac Pitman & Sons, Ltd.; New York: Pitman Publishing Corporation, 1935. pp. x, 212. Index. \$3.00.) This little book is characterized by a power for concise and accurate statement. It is avowedly introductory, and while too brief to be profound, it is penetrating. The reader is led from the notion of the State, through their interrelations and the law which controls them, into the realm of the international unions and the League of Nations. Part II expounds the methods of pacific settlement of international disputes with most emphasis on arbitration and judicial settlement. The chapter here on "Legal and Political Disputes" is interesting but out of key. Part III, "International Coöperation" is a terse exposition of mandates, minorities, labor and other problems from the organizational standpoint. There are a number of documents in the appendices. Professor Hedges takes a realistic view but, regarding the force of public opinion, ends on too optimistic a note for

Professor Paul Mantoux who contributes a foreword. A reliable book for the layman and a useful *coup d'oeil* for the beginning student.

PHILLIP C. JESSUP

*La Démocratie. Essai Sociologique, Juridique et de Politique Morale.* By Rodolphe Laun. (Paris: Librairie Delagrave, 1933. pp. 228. Index. Fr. 45.) This volume, which appears as the fourth of the series of the *Bibliothèque de l'Institut International de Droit Public*, is an elaborately sustained, critical and well-documented thesis upon the true nature of democracy, in which the author attempts to distinguish between subjective and objective elements and to reach "scientific" conclusions. Successive chapters deal with the Social Structure of Democracy, the Legal Principles of Democracy and the Moral Aspects of Politics. The author affirms that the history of the world shows an abandonment of recourse to violence and the growth of voluntary obedience in the field of moral-political relations. A democracy is, he says, "a state in which obedience is founded less upon fear and more upon the collective conscience." Democracy is based upon the free will of the entire population of the state and depends more than any other system upon the moral conscience and the sentiment of justice of the obeying masses. In this way it is possible to reconcile democracy with the principle of dictatorship which expresses the voluntary obedience of the masses to a leader, a "democratic dictatorship." Since it is only a small number of persons who actually exercise power, it can be said that "the evolution towards democracy through all history is the evolution from the aristocracy of force to the aristocracy of thought." In a postscript the author finds it possible to reconcile his theory of the evolution of democracy with the Nazi theory of the totalitarian state (as of July, 1933). Whether the subsequent suppression of freedom of speech and of the press in Germany would have led the author to change his views can only be surmised; for the volume in its somewhat metaphysical analysis of the factors of control in a democracy does not make clear the author's attitude towards certain of the conditions attending the formation of the "collective conscience" upon which democracy is based. The only way of knowing whether obedience to rulers is "voluntary" is to observe its manifestations under conditions which permit complete freedom of speech and of the press, the right of assembly, and the right of minority organization. Moreover, if a temporary majority, however substantial, is to be assumed to speak for the whole people and thereupon to foreclose all further discussion, the evolution of democracy towards the higher forms contemplated by the author would seem to be impossible. C. G. F.

*Les Principes de la Constitution Espagnole de 1931.* By Paul Marland. (Paris: A. Pedone, 1935. pp. iv, 187. Fr. 20.) Dr. Marland has made a thoughtful canvass of the ideas underlying the Spanish constitution of 1931, and a useful estimate of its significance. The book is not a detailed analysis of the text. The first section sketches the background of the revolution. Another recounts briefly the April revolt and the drafting of the constitution. A third section takes up the bill of rights, and the fourth treats the relation of the constitution to international law. The first two sections add little to the voluminous literature of the 1931 revolution already available in Spanish and French. The chapters on the bill of rights are valuable, especially because careful comparison is made with other post-war European constitu-

tions. The section on the coördination of constitutional with international law is Dr. Marland's chief contribution. These chapters make clear the significance of the conscious adaptation of a national constitution to the League of Nations and the Kellogg-Briand Pact, both of which are woven into the fabric of the 1931 charter. More exhaustive treatment of this theme in lieu of the already familiar political background would have been welcome. Insufficient attention is given to peculiarly Spanish questions, such as the position of the church and the scheme of autonomous regions. On the phases of prime interest to foreigners, however, the volume is very adequate.

WILLIAM H. HESSLER

*Vollmacht und Ratifikation bei völkerrechtlichen Verträgen nach Deutschem Recht.* By Hans Otto Meissner. (Göttingen: Vandenhoeck and Ruprecht, 1934. pp. 99. Rm. 4.80.) Within less than one hundred pages this study presents a concise and suggestive discussion of a wide range of questions connected with the treaty-making process. The development, nature, legal significance and effect of the "full power" and of ratification, the beginning and the end of that process, are considered from the point of view of both international and municipal law. Such matters as the right to refuse ratification, the making of reservations, accession to treaties, and the conclusion of treaties which are subject to ratification but which by their own terms become operative prior thereto, are taken into account, but in most instances the discussion is all too brief and based, for the most part, on secondary sources. German treaty-making procedure, especially as developed since the fundamental changes of 1933, is described in some detail, but this feature of the book is of rather less prominence than the title would seem to suggest.

VALENTINE JOBST III

*Allgemeine Theorie des faschistischen Staates.* By Sergio Panunzio. Translated from the Italian by Dr. Harald Frick. (Berlin and Leipzig: Walter de Gruyter & Co., 1934. pp. 156. Rm. 6.) The present work is an expression of the mature ideology of Fascism written from the point of view of the Hegelian idealism of Gentili. While emphasizing the importance of an understanding of the fundamental political ideas of Fascism, the author avoids the common error of attributing an *ex post facto* historical and philosophical pedigree to a movement which has been characterized throughout by its pragmatic spirit. The general principles developed in the first part (pp. 9-67) are applied in the second (pp. 68-146) to an analysis of the more important institutions of the Fascist State.

LAWRENCE PREUSS

*The League of Nations' Covenant: A Juridical Study.* By K. R. R. Sastry. (Madras: Devi Press, 1935. pp. x, 145. Index. 3s.) In preparing this small volume the author has consulted innumerable very good secondary sources, culling apt quotations with avidity. To give but one example, the citation for a quotation from Hugo Grotius is "The American Journal of International Law, 1921, p. 350." As a juridical study of the League Covenant, the book is thoroughly inadequate and, in some places, glaringly inaccurate. The author does not confine himself to his juridical purpose but tells of the development of international law, of the Manchurian crisis (decriing "the cheap wit and shallow philosophy" of the critics of the League, and praising the League for forcing Japan to withdraw from Manchuria in

1931!), of the Saar, Danzig, the minorities treaties, and the *Lotus* case. The spirit of the book is forward-looking.

HERBERT W. BRIGGS

*Die Anerkennung ausländischer Staatsakte.* By Hannah Schwarz. (Berlin-Grunewald: Verlag für Staatswissenschaften und Geschichte, 1935. pp. xvi, 63. Rm. 5.) This is a study in the domain of private international law, a study dealing with the so-called extraterritorial effect of laws and acts of public law. The novelty of this study in the German literature lies in the fact that the author does not distinguish these foreign acts of public law according to the authority—legislative, judicial, administrative—which has done them, but according to their nature, whether they determine the private legal sphere in a concrete case, or whether they are of a legalizing or a merely certifying character. The attitudes of the different municipal laws toward these three groups of foreign acts of public law are studied. The author then proceeds to show uniform tendencies in the practice of different states and ends with a discussion of the well-known problem, whether—and if so, which—rules of general international law, not of mere particular treaty law, dominate the regulation of the conflict of laws by the states.

JOSEF L. KUNZ

*The American Doctrine of State Succession.* By Herbert A. Wilkinson. (Baltimore: Johns Hopkins Press, 1934. pp. 137. Index. \$1.25.) In this volume "state succession" is defined as any territorial re-organization involving a change of sovereignty (p. 16), and all episodes of that kind in which the United States has been concerned are examined, whether the transformations were in the territory of the United States itself, or in other political entities so as to affect the interests of the United States. The principles discussed relate to public and private law, private rights, nationality, public debts, financial obligations, and treaties. In seeking to discover the American doctrine of state succession the author very properly assumes that his conclusions should "be based upon what has been done rather than what has been said" (p. 15), and he has evidently combed the archives very thoroughly and mobilized masses of evidence before attempting to discern any theories. The general conclusion is that the United States has maintained that state succession should not affect private rights, but that public questions by their very nature must be exposed to the dictates of political expediency inherent in transfers of territory. The criteria for determining whether an interest is public or private could have been revealed in greater detail, but to the extent that there are conclusions, they appear to be sound.

DENNIS DEWITT BRANE

*Friendly Relations: A Narrative of Britain's Ministers and Ambassadors to America (1791-1930).* By Beckles Willson. (Boston: Little, Brown & Co., 1934. pp. xiii, 350. Index. \$4.00.) This book lives up to its sub-title better than to its title, as its rather limited narrative should in fairness be balanced by a thorough knowledge of the history of Anglo-American relations with which it deals. It consists of extensive quotations from the despatches of British diplomats in the United States, with a connecting discussion. Most of the excerpts are printed for the first time. The selections are of interest, although the author appears to have been guided not by their importance, but by a tendency to capitalize upon the more pungent phrases of the diplomats. Difficulties perhaps occupied more space in the despatches

than the basic currents of facts, policies, and sentiment which have made possible the 120 years of friendly relations. But to follow that ratio in such a compilation leaves a false impression. The narrative discussion seems too incomplete satisfactorily to explain difficult problems to the general reader, and, on the other hand, too inaccurate and disconnected to please the scholar. Questions of international law are hardly touched upon in the quotations, and only slightly in the text. It seems unfortunate that the author allowed some of the diplomats' impressions of United States officials to stand without an evaluation of their judgment. Unfair portrayals of Thomas Jefferson and Elihu Root, in particular, may be left with British readers by the comments of certain rather unfortunate British agents. PHILIP C. BROOKS

*The Cuban Crisis as Reflected in the New York Press.* By Joseph E. Wisan. (New York: Columbia University Press, 1934. pp. xxv, 477. Bibliography. Index. \$4.50.) This is an unusual type of book. Its duplicate would be hard to find anywhere. On a thin, but sufficient thread of narrative, it carries along by summary, paraphrase, interpretation or quotation the news dispatches, special articles and editorials that appeared in certain of the New York newspapers from week to week or even from day to day preliminary to the outbreak of the Spanish-American War. There is an informing chapter on the great papers, some of which, like the *World* and the *Journal*, became sensational publications, whose circulation grew fabulously on the excitement they created. The reader gets an insight into the policies of the men who published them—Bennett, Pulitzer, Hearst and others. The reader is impressed by the fact that the more rabid newspapers not only influenced the action of the people and Government of the United States by their thrilling dispatches and inflammatory comments, but by certain other questionable news enterprises, the outgrowth of their rivalry for public attention. Students who are investigating the history of this period will be put on track of sifted historical material by reading this book. The author has done a very thorough-going piece of work of its kind. Exact references to the newspapers by name and dates are printed at the bottom of his pages. His commentary is remarkable for its continuity, and is persuasive as well as enlightening. JAMES L. TRYON

*Toward Understanding Japan. Constructive Proposals for Removing the Menace of War.* By Sidney L. Gulick. (New York: Macmillan Co., 1935. pp. xii, 270. Index. \$2.00.) This volume, intended for the general reader and not for the specialist, is successful in the purpose set forth in its title. The author is qualified, by his long residence in Japan, his desire for understanding, and by his ability to write simply and clearly, to make a contribution to the popular literature on the relations between the United States and Japan. The book, however, is a contribution to popularization, rather than one of originality, being based to a large extent upon American and Japanese books, articles and speeches of recent years. As such, it may be strongly recommended.

*Diplomatic Correspondence of the United States. Inter-American Affairs, 1831-1860.* Selected and arranged by William R. Manning. Vol. V, Chile and Colombia. (Washington: Carnegie Endowment for International Peace, 1935. pp. xlii, 1015. Index. \$5.00.) This, the fifth volume of correspondence upon inter-American affairs in the archives of the Depart-

ment of State, maintains the high level of editorial competence which Dr. Manning established at the outset of the ambitious project which is being so handsomely carried on, thanks to the assistance of the Carnegie Endowment. This volume is limited to the correspondence between the United States and Chile and Colombia during the years of 1831-60. The correspondence with Chile concerns claims for the most part—that of the *Macedonian* being the most important. Hardly less so, however, is the matter of diplomatic and consular asylum. As for the correspondence with Colombia (New Granada), it is of the utmost importance in the development of the canal policy of the United States. New Granada maintained a legation at Washington less than half the time covered by the present volume, while the United States was represented at Bogotá continuously with the exception of the years 1857-9. Therefore, there resulted a series of despatches of extraordinary fullness. The subjects of isthmian transit, canal projects and the negotiations (without formal full powers or even instructions *ad hoc*) of the treaty of 1846 alone make the volume of great significance.

J. S. REEVES

*Fontes Juris Gentium.* Edited by Viktor Bruns. Series A, Section I, Volume III. Digest of the Decisions of the Permanent Court of International Justice, 1931-1934; by Ernst Schmitz and B. Schenk Graf von Stauffenberg. (Berlin: Carl Heymanns Verlag, 1935. pp. xx, 108 (double). Index. Rm. 17.) The continuation of this useful digest follows the plan adopted for the earlier volume (Series A, Section I, Volume I).<sup>1</sup> Cross references to the earlier volume enable one to survey the court's entire jurisprudence to the end of 1934, quickly and accurately. The names of the editors are in themselves a guarantee of reliability, and the high standard previously set is fully maintained.

*Treaties and Other International Acts of the United States of America.* Edited by Hunter Miller. Volume 4, Documents Nos. 80-121, 1836-1846. Department of State Publication, No. 645. (Washington: Government Printing Office, 1934. pp. xxvi, 855. \$4.00.) The excitement inspired by the earlier parts of this collection is revived by the appearance of this volume.<sup>2</sup> The excellent style of presentation improves as the work progresses. Chiefly of interest in this volume are the inclusions; many new documents are being brought to light, and the historical notes afford useful keys to their understanding. For example, fifty pages are devoted to the annexation of Texas in 1845. Even agreements for the settlement of individual claims are included. One now grows impatient for the completion of this gigantic task, for it opens to students of treaty law of the United States a rich opportunity for fresh burrowing.

*International Law in Peace and War. Part II. Conflicts between States.* By Axel Möller. Translated by H. M. Pratt. (Copenhagen: Levin & Munksgaard; London: Stevens & Sons, 1935. pp. xxxii, 323. Index.) This volume completes the English translation of Professor Möller's useful treatise.<sup>3</sup> It is chiefly devoted to the settlement of disputes and the prevention of war, though more than one hundred pages are given to war and neu-

<sup>1</sup> See the review in this JOURNAL, Vol. 25 (1931), p. 795.

<sup>2</sup> *Ibid.*, Vol. 26 (1932), p. 439; Vol. 28 (1934), p. 626.

<sup>3</sup> Previously reviewed in this JOURNAL, Vol. 21 (1927), p. 835; Vol. 26 (1932), pp. 441, 442.

trality. The author states that the rules of neutrality were "infringed to an outrageous extent during the Great War," and that "neutrals will hardly receive a more gentle fate in another big war." To prevent this, he makes a strong case for the strengthening of the League of Nations: "any state, large or small, which forsakes the League and its institutions will be acting without any sense of responsibility." The appendices contain additions to the earlier volume.

*La Prescription en Droit International Public.* By P. A. Verykios. (Paris: A. Pedone, 1934. pp. x, 208. Fr. 30.) This is a competent study of a somewhat neglected subject. As to acquisitive prescription, a sharp distinction is drawn between inhabited territories and those which are uninhabited or inhabited by savages; as to liberative prescription, private and public debts are distinguished. The author's conclusions (pp. 190-192) are worthy of careful consideration. The bibliography indicates both the support of and opposition to the existence of the principle in international law.

MANLEY O. HUDSON

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\* Mention here does not preclude a later review.

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## THE UNILATERAL DENUNCIATION OF TREATIES BY ONE PARTY BECAUSE OF ALLEGED NON-PERFORM- ANCE BY ANOTHER PARTY OR PARTIES

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On March 16, 1935, the Chancellor of the German Reich promulgated a law for the introduction of a system of general compulsory military conscription with a view to increasing the strength of the German army to twelve corps consisting of thirty-six divisions, aggregating, it was estimated, a total of 600,000 men. On the same day he convened the diplomatic representatives of the European Powers at Berlin and delivered to them the text of the law. The promulgation of this law had already been preceded by an official announcement on March 9 that the military air force of Germany had been reconstituted. Both measures were in contravention of certain provisions of Part V of the Treaty of Versailles to which Germany was a party, and this was frankly admitted by the Chancellor and his associates of the German Government. By Article 160 of the Treaty of Versailles the maximum strength of the German army was limited to seven divisions of infantry and three divisions of cavalry comprising not more than 100,000 men and 4,000 officers. By Article 173 universal compulsory military service was abolished in Germany, the recruitment of the army which the treaty permitted being allowable only by voluntary enlistment. By Article 198 Germany was forbidden to maintain any military or naval air forces. By the preamble to Part V of the treaty Germany undertook "strictly to observe the military, naval and air clauses which follow." The German Chancellor maintained,<sup>1</sup> however, that, whereas Germany had performed with "unexampled faithfulness" her engagements under those clauses, the other parties to the treaty had not performed theirs, and that consequently Germany had a right to denounce the clauses unilaterally and to cease further performance of the obligations which she had assumed under them. She was, he added, "compelled of her own accord to take those necessary measures which could ensure the end of a condition of impotent defenselessness of a great people and Reich, which was as unworthy as in the last analysis it was menacing."

On March 18 the Government of Great Britain addressed a rather mildly worded communication to the German Government in which it protested against the German action as a violation of the Treaty of Versailles,<sup>2</sup> and

<sup>1</sup> In an address to the German people issued on the day of the promulgation of the law for the introduction of conscription and the enlargement of the army. Text in New York Times, March 17, 1935. See also the Chancellor's address of May 21 to the Reichstag, *ibid.*, May 22, 1935.

<sup>2</sup> Text in New York Times, March 19, 1935.

three days later the French and Italian Governments addressed more vigorous protests against the same act.<sup>3</sup> The French note reminded Germany that the "decisions" both of March 9 and March 16 were "definitely contrary to the contractual engagements written in the treaties which Germany signed" and were "equally contrary to the declaration of December 19, 1932, whereby the Reich Government voluntarily recognized that a general statute of armaments carrying equality of right for Germany with all nations should not be made without the establishment of a security régime for all." The German Government was also reminded that it was an established principle of international law that no party to a treaty can rightly denounce its engagements thereunder or modify the stipulations thereof, except with the consent of the other parties. The Italian protest concluded with the statement that the Government of Italy could not in eventual future negotiations "simply accept as situations of fact those determined by unilateral decisions which annul undertakings of an international character." At the same time the French Government dispatched a communication to the League of Nations calling attention to the fact that Germany, whose withdrawal from the League does not become effective until October 21, 1935, had violated her obligations under the Covenant in repudiating her treaty engagements, scrupulous respect for which was one of its declared objects.<sup>3a</sup> Charging that the action of Germany "threatened to disturb international peace," and basing its request on Article XI, paragraph 2, of the Covenant, France asked that an extraordinary session of the Council be called to examine the situation, and the request was promptly complied with. Further, at a conference in April, 1935, representatives of Great Britain, France and Italy, meeting at Stresa for the purpose of considering the situation produced by Germany's repudiation of the treaty provisions mentioned above, declared that those Powers were "in complete agreement in opposing, by all practicable means, any unilateral repudiation of treaties which may endanger the peace of Europe, and will act in close and cordial collaboration for this purpose."<sup>4</sup>

On April 17 a resolution was unanimously approved by the Council of the League, meeting at Geneva, declaring that "Germany has failed in the duty which lies upon all the members of the international community to respect undertakings which they have contracted," and condemning "any unilateral repudiation of international obligations." The condemnatory clause was preceded by a declaration drawn from the London protocol of 1871 that "it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty nor modify the stipulations thereof unless with the consent of the other contracting parties."<sup>5</sup> The resolution

<sup>3</sup> Text in New York Times, March 22, 1935.

<sup>3a</sup> League of Nations Official Journal, 1935, p. 569.

<sup>4</sup> Text of the communiqué in New York Times, April 15, 1935.

<sup>5</sup> *Ibid.*, April 17 and 18, 1935; League of Nations Official Journal, 1935, p. 551.

was laid before the Council by France, Great Britain and Italy after it had been found impossible to induce any so-called neutral member of the Council to serve as rapporteur and present a resolution. The resolution was voted for by the following states members of the Council: Great Britain, France, Italy, Russia, Poland, Czechoslovakia, Turkey, Spain, Portugal, Mexico, Australia, Argentina and Chile. This embraced all the members of the Council except Denmark, which, for reasons of public policy of a somewhat delicate nature due to her relations with Germany, abstained from voting.

The Council did not, however, indicate that, as a result of her action, Germany should be subjected to a penalty—a consequence which logic ordinarily requires when an accused has been adjudged guilty. It contented itself instead with appointing a committee of thirteen to frame “measures to make the Covenant more effective in the organization of collective security and to define in particular the economic and financial measures which might be applied, should in the future a state, whether a member of the League of Nations or not, endanger the peace by unilateral repudiation of its international obligations.” In other words, the Council seems, in effect, to have decided that, while Germany was guilty of having wrongfully repudiated her treaty obligations, she was not to be punished in this instance; but that, since she might attempt to do it again, she as well as any other states which might in the future similarly seek to repudiate their treaty engagements, should stand forewarned that an inquiry was to be made with a view to determining what economic and financial measures of coercion might be applied against them in such cases.

Although Germany appears to have escaped with nothing more than a moral rebuke for her act, the effect of a verdict pronouncing her a treaty-breaker, unanimously voted by a body representing thirteen countries, great and small, some of which she regarded as her friends, evidently left a sting of humiliation and disappointment. Shortly after the adoption of the Council resolution the German Government delivered to the diplomatic representatives at Berlin of each of the thirteen states voting for the resolution a note in which it challenged their right to set themselves up as judges of Germany's conduct and declared that the resolution represented an attempt at a new discrimination against Germany, which it rejected in “the most resolute manner.”<sup>6</sup>

It appears from the above facts that the issue raised by the action of Germany is as to the right of one party to a treaty unilaterally to terminate it in whole or in part as between itself and another party or parties thereto which it considers to have violated the treaty. It is not to be denied that numerous reputable authorities on international law and treaty law have, by implication at least, recognized the existence of such a right, and that there are likewise statements of diplomats and dicta of courts to the effect that violation

<sup>6</sup> Text in New York Times, April 21, 1935.

of a treaty by one party renders it voidable at the option of the other party. Thus Crandall, for example, remarks that the difficulty of compelling specific performance or of securing satisfactory compensation for damages "renders it even more necessary and equitable, than in the case of private contracts, that upon a breach of a treaty the continuance of the obligation should be made dependent upon the will of the party faithfully performing."<sup>7</sup> Hall, in similar vein, points out that within the state it is settled by municipal law through the courts whether a contract which has been broken shall be enforced or annulled, but that "internationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual state must be allowed in all cases to enforce or annul for itself as it may choose." The "general rule," he adds, is clear that "a treaty which has been broken by one of the parties to it is not binding upon the other, through the fact itself of the breach, and without reference to any kind of a tribunal."<sup>8</sup> Professor Hyde doubts the feasibility of prescribing precisely the circumstances in which a state may unilaterally abrogate a treaty, but he asserts that it "is to be acknowledged, however, that failure of a contracting state to observe a material stipulation of its agreement is deemed to justify another party to take such a step."<sup>9</sup> Cavaglieri considers the right of unilateral abrogation by the innocent party in the event of breach of a treaty to be one which is "*assuré par une règle de droit général qui nous paraît incontestable*,"<sup>10</sup> and Dupuis regards it as a remedy which, although an *ultima ratio* and a *pis aller*, is not to be avoided when a state refuses "*manifestement et systématiquement*" to execute its treaty obligations.<sup>11</sup> Oppenheim probably accurately describes the position taken by publicists generally, in these words:

✓ Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion of the other party to cancel it on this ground. There is indeed no unanimity among writers on international law in regard to this point, since a minority make a distinction between essential and non-essential stipulations of the treaty, and maintain that only violation of essential stipulations creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential as well as essential stipulations, and that it is for the faithful party to consider for itself whether violation of a treaty even in its least essential parts, justifies its cancellation.<sup>12</sup>

<sup>7</sup> S. B. Crandall, *Treaties, Their Making and Enforcement* (2d ed.), p. 456.

<sup>8</sup> W. E. Hall, *International Law* (8th ed.), p. 408.

<sup>9</sup> C. C. Hyde, *International Law*, II, p. 88.

<sup>10</sup> A. Cavaglieri, "*Règles Générales du Droit de la Paix*," *Académie de Droit International, Recueil des Cours*, XXVI, p. 535.

<sup>11</sup> C. Dupuis, "*Les Relations Internationales*," *Académie de Droit International, Recueil des Cours*, II, p. 340.

<sup>12</sup> L. Oppenheim, *International Law*, 4th ed., I, p. 756.

In 1791 James Madison wrote that a breach of treaty by one party "discharges the other," the latter being, however, "at liberty to take advantage or not of the breach, as dissolving the treaty."<sup>13</sup> The American representatives charged with the negotiation of the treaty of September 30, 1800, between the United States and France asserted "that a treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the others to renounce and declare the same to be no longer obligatory. . . ."<sup>14</sup> Secretary of State Frelinghuysen maintained that the Clayton-Bulwer Treaty "was voidable at the option of the United States" because, for one reason, Great Britain had "persistently violated her agreement not to colonize the Central American coast."<sup>15</sup> Secretary Olney likewise believed that Great Britain's non-compliance with the Clayton-Bulwer Treaty between the years 1850 and 1860 "might well have been made the ground for an annulment of the treaty altogether."<sup>16</sup> Secretary Lansing in 1917 voiced similar opinions with respect to certain treaties between the United States and Germany which he considered the latter country to have violated.<sup>17</sup> Statements to much the same effect have appeared in the diplomatic correspondence of various states.<sup>18</sup>

In *Ware v. Hylton* (1796)<sup>19</sup> Mr. Justice Iredell declared it to be "a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. . . ." The Supreme Court reiterated that view in *Charlton v. Kelly* (1913),<sup>20</sup> and similar statements have been made by other courts.<sup>21</sup> President Coolidge, as arbitrator in the Tacna-Arica Case, asserted, by way of dictum, "that a willful refusal of either party . . . to fulfill a treaty obligation would have justified the other party in claiming discharge from the provision."<sup>22</sup> There appears, however, to be no decision of an international tribunal actually sustaining the assertion of such a claim.

It must be evident that if international law does admit the right of a state unilaterally to denounce or terminate a treaty as between itself and a party thereto which it alone decides has violated the treaty, international law thereby recognizes a very serious limitation upon the fundamental principle *pacta sunt servanda*—a limitation which, if it would not actually render that principle quite illusory, would at least leave the whole treaty system very fragile indeed. For, without even assuming the extreme and perhaps un-

<sup>13</sup> J. B. Moore, *Digest of International Law*, V, p. 321.

<sup>14</sup> F. Wharton, *Digest of International Law*, 2d ed., II, p. 60.

<sup>15</sup> Quoted in *Hooper v. United States* (1887), 22 Ct. of Cl. 408.

<sup>16</sup> Moore, *Digest of International Law*, III, p. 205.

<sup>17</sup> See Hyde, *International Law*, II, p. 90 and n. 1, citing *American White Book*, *European War*, IV, 415, 417.

<sup>18</sup> See, e.g., Bruns, *Fontes Juris Gentium*, Ser. B, sec. 1, tom. 1, pars 1, fasc. 2, pp. 791-795.

<sup>19</sup> 3 Dallas 199, 261.

<sup>20</sup> 229 U. S. 447.

<sup>21</sup> Cf. *In re Thomas* (1874), 23 Fed. Cas. 927; *Hooper v. U. S.* (1887), 22 Ct. of Cl. 408.

<sup>22</sup> *This JOURNAL*, Vol. 19 (1925), p. 398.

likely case of recourse to such a right by states acting in bad faith, it is clear that under it a state might at any time free itself from its obligations under a treaty if it were simply prepared to assert that the other party or parties had, in its honest opinion, violated the treaty. Many writers who have asserted that the right of unilateral denunciation exists, have recognized this difficulty as well as the danger of abuse to which the possession of the right might lead in practice, and have consequently sought to restrict it by saying that it might be exercised only as a last resort, or only in the event of a serious, or manifest, or systematic breach, etc. Such limitations are obviously of little or no significance, however, if their application is to be left solely to the state which seeks to free itself from a treaty because of an alleged breach thereof by another party. The party alleging the breach would still, in violation of sound and recognized principles of justice, stand as the final judge of its own cause in a case which must almost inevitably involve questions of fact and of treaty interpretation about which there may be *bona fide* differences of opinion.<sup>23</sup> Some further reference may be made to the case of Germany's repudiation of Part V of the Treaty of Versailles by way of illustration.

The German argument in support of its recent action—it appears to have been carefully stated by Dr. Viktor Bruns in an article entitled "*Deutschlands Gleichberechtigung als Rechtsproblem*"<sup>24</sup>—is that the Allied and Associated Powers were bound to Germany by treaty obligations to reduce their own armaments, that Germany's duty to continue to observe the clauses of Part V was conditioned upon the fulfillment by them of their obligations, and that those obligations not having been performed after the lapse of nearly fifteen years, Germany's obligations ceased to be binding upon her and might therefore be unilaterally denounced without the consent of the other parties. This reciprocity of obligation, it is argued, is to be found in the so-called *Novembervertrag* concluded between Germany and her enemies in the early days of November, 1918, in the preamble to Part V of the Treaty of Versailles, in Article 8 of the Covenant of the League of Nations, and in the conditions under which Germany became a member of the League in 1926.

The terms of the *Novembervertrag* are to be found in the exchange of notes between the German Government and the President of the United States in October and November, 1918,<sup>25</sup> which admittedly gave rise to certain binding

<sup>23</sup> The Permanent Court of International Justice has declared it to be a "well-known rule" that no one can be judge in his own suit. Publications of P.C.I.J., Ser. B, No. 12, p. 32. Cf. the following statement in the award in the Chilean-Peruvian Accounts case: "It is a well-established principle of international law that after a treaty, possessing all the elements of validity, has been formally executed, it can only be altered or amended before its proper expiration by the same authority and under the same formality of procedure, as the original; and especially is it not permissible for either party to interpret its provisions according to his own fancy." Moore, *History and Digest of International Arbitrations*, II, p. 2102.

<sup>24</sup> *Schriften der Akademie für Deutsches Recht*, No. 3, Berlin, 1934.

<sup>25</sup> Texts in Kraus and Rödiger, *Urkunden zum Friedensvertrage von Versailles vom 28. Juni 1919*, p. 4 ff; summary in Temperley, *A History of the Peace Conference of Paris*, I, p. 377 ff.

obligations. Germany's contention is that Point 4 of President Wilson's Fourteen Points set forth in his address to Congress on January 8, 1918, constitutes a part of the *Novembervertrag*. Point 4 reads: "Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety."<sup>26</sup> This guarantee of armament reduction, it is said, had reference not merely to the armaments of Germany and her allies, but also to those of their enemies. Germany agreed to conclude peace on the basis of this and the other points mentioned in the President's address. The *Novembervertrag*, therefore, according to the German view as set forth by Bruns, created a reciprocally binding legal obligation for all parties thereto to reduce their armaments, and the duty of performance by Germany was conditioned upon performance by the parties on the other side. It might well be urged in reply to the German contention, however, that Point 4 of the Fourteen-Point address did not create for the parties to the *Novembervertrag* a separate and independent obligation to reduce their armaments; that it created, rather, an agreement with Germany to conclude a treaty of peace containing "adequate guarantees given and taken" that national armaments would be reduced. It might then be said that by Part V of the Treaty of Versailles Germany gave, and the Allied and Associated Powers took, very real and practical guarantees for the reduction of German armaments; and conversely that, by the preamble to Part V and by Article 8 of the Covenant, the Allied and Associated Powers gave, and Germany with practically no objection accepted as satisfactory, certain perhaps less definite guarantees regarding the reduction of their own armaments under the machinery of the League of Nations.<sup>27</sup> The obligation embodied in Point 4 of the Fourteen Points might, therefore, be said to be no longer an executory obligation; it was fulfilled and finally executed as a result of the conclusion of the Treaty of Versailles. It might also be said that, even if by the Treaty of Versailles the Allied and Associated Powers failed to conclude a peace in accordance with the terms agreed upon in the *Novembervertrag*, including Point 4, that fact would not justify a German refusal now to abide by the Treaty of Versailles which was duly signed, sealed and ratified on Germany's behalf. It was Germany's privilege to refuse to accept that treaty if she felt that it did not conform to the principles upon which she had previously agreed, but having accepted it she waived that privilege. International law, it might certainly be argued, does not yet consider a treaty of peace any the less legally binding because it was necessarily accepted by the defeated Powers in preference to a continuation of the war, although its terms were not entirely satisfactory to them.

In the second place the Germans invoke in support of their point of view the preamble to Part V of the Treaty of Versailles which contains the military, naval and air clauses. This preamble reads as follows: "In order to render possible the initiation of a general limitation of armaments of all

<sup>26</sup> Kraus and Rödiger, *op. cit.*, p. 1.

<sup>27</sup> Cf. Temperley, *op. cit.*, II, pp. 395-396.

nations, Germany undertakes strictly to observe the military, naval and air clauses which follow." In the reply of the Allied and Associated Powers of June 16, 1919, to the observations of the German delegation on the conditions of peace laid down by the Treaty of Versailles, it was said:

They recognise that the acceptance by Germany of the terms laid down for her own disarmament will facilitate and hasten the accomplishment of a general reduction of armaments; and they intend to open negotiations immediately with a view to the eventual adoption of a scheme of such general reduction. It goes without saying that the realisation of this programme will depend in large part on the satisfactory carrying out by Germany of her own engagements.<sup>28</sup>

The reply went on to say that, as it was the colossal growth in German armaments that had forced the other nations of Europe to increase their armaments, it was only right and necessary that the process of limitation should begin with Germany. It was said, nevertheless, that:

The Allied and Associated Powers wish to make it clear that their requirements in regard to German armaments were not made solely with the object of rendering it impossible for Germany to resume her policy of military aggression. They are also the first steps towards that general reduction and limitation of armaments which they seek to bring about as one of the most fruitful preventives of war, and which it will be one of the first duties of the League of Nations to promote.<sup>29</sup>

Here, it is argued by the Germans, is a definite treaty undertaking on the part of the Allied and Associated Powers to reduce their armaments in return for Germany's acceptance of an obligation to reduce hers first. Germany, it is then said, promptly performed her part of the contract, but, after fifteen years, the other Powers have not only not reduced or limited their armaments but have, in fact, increased them. As a result of this non-performance by the Allied and Associated Powers of their obligations under Part V of the treaty, therefore, Germany is no longer bound to observe hers. By way of reply to this contention, however, it might be pointed out that the preamble to Part V speaks only of rendering *possible* the *initiation* of a general limitation of armaments, and that the reply of the Allied and Associated Powers apparently interprets it to involve no more than an undertaking to "open negotiations immediately with a view to the eventual adoption of a scheme of such general reduction." Consequently it might be argued with a good deal of force that there was only a promise to make an effort to initiate a movement which it was hoped and believed would lead ultimately to a general agreement for arms limitation, but that neither in the preamble to Part V, nor in the clauses which follow, nor in the reply of the Allied and Associated Powers was there any definite pledge or guarantee that the movement would succeed. Indeed, in view of the manifest difficulties inevitable in reaching an agreement among a large number of states for the reduction of

<sup>28</sup> Kraus and Rödiger, *op. cit.*, p. 585.

<sup>29</sup> *Ibid.*, pp. 608, 609.

their armaments, it could be said that any such guarantee or pledge must obviously have been unthinkable. Still less, it is arguable, is there any evidence that it was the intention of the Allied and Associated Powers to condition Germany's obligation to abide by the terms of Part V upon a reduction by them of their own armaments. It might, indeed, be pointed out that, in answer to an intimation that this was the understanding of the German delegation, the reply of the Allied and Associated Powers stated:

Germany must consent *unconditionally* to disarm in advance of the Allied and Associated Powers; she must agree to immediate abolition of universal military service; a definite organisation and scale of armament must be enforced. It is essential that she should be subjected to special control as regards the reduction of her armies and armaments, the dismantling of her fortifications, and the reduction, conversion or destruction of her military establishments.<sup>30</sup>

If this latter view, rather than the German, is the correct interpretation of the pertinent provisions of the Treaty of Versailles—*i.e.*, if it is true that all the Allied and Associated Powers undertook to do in the matter of armaments was to "seek" or attempt to bring about their general reduction or limitation after the first obstacle in the path to success of such a movement had been removed by the disarmament of Germany<sup>31</sup>—then it might well be maintained that the Allied and Associated Powers have by no means defaulted on their obligation. Certainly the record of the diplomatic negotiations and the proceedings of a succession of disarmament conferences during the past twelve years might be cited to refute any contention that they had done so.

Moreover, it might also be observed that, even were it admitted that the Treaty of Versailles did create, as the Germans contend, an obligation on the part of the Allied and Associated Powers to reduce their armaments, instead of a promise merely to make an effort to do so, the treaty did not fix any period within which the obligation should be performed./ Soon after the treaty came into force, negotiations were instituted with a view to concluding

<sup>30</sup> Kraus and Rödiger, *op. cit.*, p. 609. Italics inserted. Cf. p. 611.

<sup>31</sup> This, it would seem, is the view of General Tasker H. Bliss, one of those cited by Dr. Bruns as having recognized that the Treaty of Versailles imposed upon the parties other than Germany an equal obligation to reduce their armaments. General Bliss merely asserts that the other parties to the treaty "have pledged themselves to initiate, as soon as practicable, a general limitation of armaments after Germany shall have complied with her first obligation," and again, that the Peace Conference merely "pledged itself to do what could be done" to bring about a limitation of national armaments. "The Problem of Disarmament," in House and Seymour, *What Really Happened at Paris*, p. 372.

There is some reason to believe that the principal object of the Peace Conference in limiting Germany's armaments was to insure the security of France against future attack by Germany and that the declaration that Germany's disarmament would render possible a general reduction of armaments was only a phrase, which, while no doubt expressing a desire and a hope, was not intended to record the assumption of an obligation on the part of the Allied and Associated Powers. A reading of the discussions in the Peace Conference Committee on Military, Naval and Air terms leaves one with this impression. See the summary of the discussions, in Temperley, *op. cit.*, II, especially pp. 129-130.

an agreement for a general reduction of armaments, and a succession of international conferences followed during the ensuing years. The efforts thus begun were going on when, in October, 1933, Germany withdrew from the League of Nations and ceased to participate further in the Disarmament Conference then being held. This action undoubtedly accentuated the difficulty which confronted the Allied and Associated Powers in their effort to reach an agreement. That effort was continued, however, and as late as February 3, 1935, an Anglo-French communiqué was issued which, after pointing out that the disarmament provisions of the Treaty of Versailles could not be modified by the unilateral action of any party, declared that the British and French Governments favored a general settlement freely negotiated between Germany and other Powers which would make provision for the organization of the security of Europe along certain lines therein indicated, and which would include an agreement for the reduction of armaments replacing the stipulations of Part V of the Treaty of Versailles. Ten days later the German Government returned a reply in which it welcomed "in friendly confidence" the Anglo-French proposal and promised to examine seriously the points which it contained. One month thereafter, before the date fixed for the first exchange of views between the government of Germany and the governments of Great Britain and France, the German Government promulgated the conscription law and denounced the clauses of the Treaty of Versailles with which that law was in conflict. This made further negotiation with the German Government impossible and rendered an agreement among the other parties for the reduction of their armaments hopeless.

No one who is familiar with the problem can fail to be aware of the enormous difficulties which must be overcome in reaching a general agreement among the nations for a reduction or even a limitation of their military armaments. It is not a thing to be achieved in a day, and this fact has been frankly recognized even by Germans themselves.<sup>32</sup> Consequently the failure up to the present time of the parties to the Treaty of Versailles or of the members of the League to reach an agreement can hardly be said to be proof in itself that they have not desired to do so or that they have not made earnest and sincere efforts to achieve that object. Perhaps it might even be said that Germany herself is in part responsible for the failure, first by her withdrawal from the Disarmament Conference in 1933, and second by her refusal to continue the negotiations in March, 1935, and her somewhat brusque denunciation of the military clauses. Furthermore, it might be possible to adduce evidence that the negotiations were hampered during the two years preceding the final denunciation of those clauses by the apparently well-founded belief that Germany was already re-arming in violation of the clauses.<sup>33</sup>

<sup>32</sup> Cf. the remarks of Dr. von Schubert to the League Assembly in 1926, at the time of Germany's admission to the League. Records of Seventh Assembly, Plenary, p. 108.

<sup>33</sup> Evidence of this was apparently shown in the marked increase of the German military

In such circumstances it might well be open to question whether the other parties to the Treaty of Versailles could justly be regarded as having violated their obligation, even if that obligation was to achieve, rather than to attempt to achieve, reduction of armaments. The treaty not having prescribed a fixed period within which the obligation of the Allied and Associated Powers was required to be performed, it is at least doubtful if those Powers could be justly charged with default until they had renounced or definitively abandoned all further effort to reach an agreement for the reduction of their armaments. (When a treaty imposes on one or more of the parties an obligation, without specifying a definite period of time within which it must be performed, the party obligated cannot be said to have violated the obligation if it has been prevented from performing it but has never abandoned its effort to do so. Nor does failure of performance in such circumstances release the other party from its duties under the treaty.) This was the substance of President Coolidge's award in the Tacna-Arica case.<sup>34</sup> Chile was required by a treaty with Peru to hold a plebiscite in the territories of Tacna and Arica, without any specification as to the period within which it was to be held, and the plebiscite was not held because the two countries could not reach an agreement as to the manner in which it was to be conducted. Relative to Peru's claim to be discharged from her obligation under the treaty, because, as she claimed, Chile by her own conduct had prevented an agreement for the holding of the plebiscite, the arbitrator said:

In order to justify either party in claiming to be discharged from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be found an intent to frustrate the carrying out of the provisions of Article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable agreement for a plebiscite.

It is quite true that at the time of the repudiation by Germany of the military clauses, the negotiations for the conclusion of a treaty for the general reduction of armaments had not resulted in success; but, as the negotiations had not been abandoned—on the contrary they were still in progress—it seems reasonable to argue that Germany was not justified in assuming that because the other parties would not accept her proposals or had not reached an agreement among themselves, they had no "inclination" or intention of reducing their armaments. As President Coolidge said in his award in the Tacna-Arica case, a deliberate intention to disregard a treaty engagement cannot be

budget for 1934-1935, and in subsequent increases. When inquiries were made of the German Government as to the reasons, especially for the increase in the air budget, vigorous denials were made as late as December 20, 1934, that the German Government had any intention of disregarding the treaty limitations. Nevertheless, three months later the Chancellor was able to inform the British Secretary of State for Foreign Affairs that in the matter of aircraft the Reich had already attained parity with the United Kingdom.

<sup>34</sup> This JOURNAL, Vol. 19 (1925), pp. 396-399.

"lightly imputed" by one party to the other; and, as he added: "A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion."

Another argument relied upon in support of the contention that Germany was justified in taking the action she did, is drawn from the fact of Germany's membership in the League of Nations.<sup>35</sup> The principle of equality of rights, it is said, is the foundation of membership in the League, and Article 8 envisages disarmament to the degree therein laid down for all, and not for some members only. Consequently it must have been intended that when Germany became a League member she was to be treated, in the matter of armaments, on the same basis as any other League member, and was to be freed from the discriminatory obligations imposed upon her prior to the time of her becoming a member. It is said further that when Germany, prior to her entry into the League, called attention<sup>36</sup> to the difficulties and dangers which, because of her disarmed condition, would confront her if she were called upon as a League member to participate in common military action under Article 16, and asked therefore to be permitted to reserve the right to determine for herself whether or to what extent she would participate in any action taken under that article, the Council refused her request, emphasizing in its reply<sup>37</sup> the equality of rights and obligations of all members and asserting that such a reservation "would undermine the basis of the League of Nations and would be incompatible with membership in the League." This action, it is argued, taken with full knowledge of Germany's then existing inequality and incapacity to perform her possible obligations under Article 16, amounted to recognition that Germany had a right to be released from the discriminatory restrictions placed upon her armaments by Part V of the treaty. This phase of the German argument might, however, be met with the statement that, at the time of her entry into the League, Germany did not actually put forth any claim to a right to increase her armaments beyond the amounts permitted her under the military, naval and air clauses; that her very attempt to make a reservation to Article 16 for the reasons which she advanced indicated her understanding that as a League member she would still be subject to those clauses; and that, in fact, the Council reminded Germany that "other countries whose military forces have also been limited by the provisions of existing treaties have, on entering the League, accepted the obligations of the Covenant without reservation."<sup>38</sup> There would seem to be, in short, reasonable grounds for contesting the

<sup>35</sup> See Dr. Bruns' article, cited *supra*.

<sup>36</sup> In a letter of Dec. 12, 1924, to the Secretary-General, and in a memorandum to the members of the Council. League of Nations Official Journal, 1925, p. 232.

<sup>37</sup> *Ibid.*, pp. 490-491.

<sup>38</sup> It was indicated, however, that while Germany would be bound "to contribute to the armed forces to be used to protect the covenants of the League" if the occasion demanded, she would not be expected to do more than her "military situation" permitted. Records of the Special Session of the Assembly, March, 1926, p. 45.

claim that there was anything in the negotiations preceding Germany's entry into the League to indicate an undertaking to release Germany from her obligations under Part V of the Treaty of Versailles or to suggest that the other Powers recognized any new or special obligation on their part vis-à-vis Germany to reduce their own armaments which they have since violated.

Without undertaking to pass judgment upon the merits of the German case—and certainly without ignoring the fact that moral reasons may be adduced in explanation of her action which, however, do not affect the legal aspects thereof—it is believed that the above paragraphs sufficiently indicate that the legal arguments advanced in Germany's behalf do not necessarily compel acceptance of the conclusions arrived at by her. (Those arguments present questions of fact and questions of interpretation which Germany has answered in one way, but which might conceivably be answered in another way.) (She has undertaken to decide unilaterally issues which ought rather to be decided by all the parties concerned through mutual agreement or by some tribunal or authority which they have accepted as competent.) Yet this is what a state must necessarily do if it has, and undertakes to exercise, the right to abrogate a treaty unilaterally on the ground that it has been broken by the other party or parties. In principle, therefore, it is believed that states ought not to be recognized as having such a right. Furthermore, it is submitted that customary international law, as revealed by the actual practice of states and as distinguished from the theoretical statements of publicists and the arguments of diplomats, does not recognize such a right. Attempts actually to exercise the right appear to have been remarkably rare, and when the attempt has been made, the existence of the right has been vigorously denied by the other states concerned. In this connection, reference may be made to two classical cases usually cited as examples by those who uphold the right of unilateral abrogation.

In 1798 the United States Congress passed, and the President approved, an Act which stated that "the treaties concluded between the United States and France have been repeatedly violated on the part of the French Government," and which, for that reason, declared "that the United States are of right freed and exonerated from the stipulations of the treaties and of the consular convention, heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."<sup>39</sup> When in 1799 American plenipotentiaries were sent to France to settle all controversies then existing between the two countries, they were given instructions which indicated that the United States regarded the treaties as having been effectively abrogated by the above Act.<sup>40</sup> When the American plenipoten-

<sup>39</sup> Moore, *Digest of International Law*, V, p. 356.

<sup>40</sup> They were instructed to require compensation for captures and condemnations contrary to international law and to the treaty of 1778, while the latter "remained in force." They were also to consider it "as ultimated" that "the treaties of 1778 and the consular conven-

aries sought to act in accordance with those instructions, however, and to include in the new treaty provisions relating to the adjustment of claims based upon the view that the treaties and consular convention of 1778 and 1788 had been terminated on July 7, 1798, they met with the stubborn opposition of the French representatives.<sup>41</sup> The French Government stated that it could not admit that the treaties had been annulled by the unilateral act of the United States, and with that as a basis, it was willing "to stipulate a full and entire recognition of the treaties, and a reciprocal promise of indemnities for the damages resulting, on the part of either, from their infraction." If, however, the United States persisted in its stand with regard to the treaties, France would be willing to acquiesce in their nullity, but only on the understanding that the declaration of their abrogation by the United States had constituted "an unequivocal provocation to war," that subsequent acts had been "nothing less than war," and that the new treaty being negotiated must be preceded by a treaty of peace.<sup>42</sup>

The plenipotentiaries being unable to resolve the issue thus raised, it was decided to postpone the matter by providing in Article 2 of the Convention of September 30, 1800, that, since no agreement had been possible respecting either the Treaty of Alliance and of Amity and Commerce of 1778, and the Consular Convention of 1788, or respecting the indemnities claimed, the parties would "negotiate on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation." When the convention containing this clause was submitted to the United States Senate, that body gave its approval with the proviso, *inter alia*, that Article 2 should be "expunged." The convention thus amended was returned to Paris for the exchange of ratifications, whereupon the French Government refused to agree to the excision of Article 2 except on condition that "the reciprocal pretensions" to which it referred "should not be brought forward at any future period."<sup>43</sup> Bonaparte therefore ratified the treaty subject to the condition that it should be understood that, by striking out Article 2, "the two states renounce the respective pretensions which are the object of said article."<sup>44</sup> Ratifications were then exchanged, and subsequently the United States Senate approved the qualified French acceptance and declared the treaty to be "fully ratified."<sup>45</sup>

On the above facts it seems clear that the right of the United States unilaterally to terminate the treaties with France, on the ground of alleged violation thereof by the latter country, was effectively denied by France. It would seem that the treaties were not terminated on July 7, 1798, but that,

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tion of 1788 be not revived in whole or in part. . . ." American State Papers, Foreign Relations, II, p. 306.

<sup>41</sup> See *ibid.*, II, pp. 317, 319, 320.

<sup>42</sup> *Ibid.*, II, p. 332.

<sup>43</sup> *Ibid.*, VI, pp. 144-145.

<sup>44</sup> *Ibid.*, II, p. 344.

<sup>45</sup> *Ibid.*, II, p. 345. For an account of the above case see Moore, *History and Digest of International Arbitrations*, pp. 4429-4432.

on the contrary, they were only finally and effectively terminated as a result of agreement of both states, the United States having in effect purchased that agreement by the renunciation of her spoliation claims against France.

On March 30, 1856, Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey concluded the Treaty of Paris, Articles 11, 13 and 14 of which provided for the neutralization of the Black Sea and placed certain limitations upon Russia and Turkey with respect to the establishment of military-maritime arsenals upon its coasts and the maintenance of war vessels upon its waters.<sup>46</sup> On October 19/31, 1870, during the Franco-Prussian War, the Russian Government addressed a circular note to the signatories of the Treaty of Paris denouncing the Black Sea clauses thereof and justifying that action in part on the ground that the other parties were guilty of having several times violated the treaty.<sup>47</sup> Prince Gortchakoff asserted that "Our illustrious master cannot admit, *de jure*, that treaties, violated in several of their essential and general clauses, should remain binding in other clauses directly affecting the interests of his Empire," and that therefore "His Imperial Majesty cannot any longer hold himself bound by the stipulations of the Treaty of 18/30 of March, 1856, as far as they restrict his sovereign Rights in the Black Sea. . . ."

✓The attempt of Russia thus to terminate a part of the treaty by her own unilateral act was at once branded as illegal by Great Britain, Austria-Hungary, France, Italy and Turkey.<sup>48</sup> Earl Granville, on behalf of Great Britain, vigorously declared that the right to release one or more of the parties from all or any of its obligations under a treaty had always been held to belong "only to the governments who have been parties to the original instrument," and he added:

The despatches of Prince Gortchakoff appear to assume that any one of the Powers who have signed the engagement may allege that occurrences have taken place which, in its opinion, are at variance with the provisions of the Treaty, and, although this view is not shared or admitted by the co-signatory Powers, may found upon that allegation, not a request to those Governments for the consideration of the case, but an announcement to them that it has emancipated itself, or holds itself emancipated, from any stipulations of the Treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such doctrine, and of any proceeding which, with or without avowal, is founded upon it, is to bring the entire authority and efficacy of Treaties under the discretionary control of each one of the Powers who may have signed them; the result of which would be the entire destruction of Treaties in their essence. For whereas their whole object is to bind Powers to one

<sup>46</sup> E. Hertslet, *Map of Europe by Treaty*, II, pp. 1256-1257.

<sup>47</sup> *Ibid.*, III, pp. 1892-1895.

<sup>48</sup> Excerpts from the correspondence may be found in Bruns, *Fontes Juris Gentium*, Ser. B, sec. 1, tom. 1, pars 1, fasc. 2, pp. 759-768. See also *Das Staatsarchiv*, LX, pp. 120, 123, 124-125, 127, 134-136, 140, 152, 180. Prussia, for political reasons arising out of Russian friendliness during the Franco-Prussian War, avoided any forthright expression of opinion.

another, and for this purpose each one of the parties surrenders a portion of its free agency, by the doctrine and proceeding now in question, one of the parties in its separate and individual capacity brings back the entire subject into its own control, and remains bound only to itself.<sup>49</sup>

It was finally agreed that the Powers should meet in London to discuss the situation raised by Russia's declaration. On January 17, 1871, all of them, including Russia, subscribed to a protocol by which they recognized "that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement."<sup>50</sup> Thereafter (March 13, 1871) a new treaty was concluded which declared the Black Sea clauses of the Treaty of Paris to be thereby annulled, and which substituted certain new provisions in their stead.<sup>51</sup> Here again, it would seem the right of unilateral termination was not recognized nor successfully asserted; on the contrary, the Black Sea provisions of the Treaty of Paris were not legally terminated until the Treaty of March 13, 1871, marked the express agreement of the parties to that termination.

The above cases may be said to be the most important, if not the only instances, in which states have gone beyond mere verbal assertion of the existence of the right and have actually attempted to effectuate unilaterally the termination of a treaty because of alleged violation of its terms by other parties. If the practice as revealed in those cases constitutes evidence of the law, then it seems plain that international law does not recognize the right claimed by the United States in 1798, by Russia in 1870, or by Germany in 1935. The London Protocol of 1871 still appears to state the law accurately; in 1928 the Sixth Conference of American States inserted in its Convention on the Law of Treaties the rule that "no state can relieve itself of the obligations of a treaty or modify its stipulations except by agreement, secured through peaceful means, of the other contracting parties."<sup>52</sup> A recent investigator, after examining in detail the cases in which states have sought release from treaties under the principle of *rebus sic stantibus*—and it is possible to consider the case arising out of violation of a treaty by one or more parties as coming under that principle<sup>53</sup>—has asserted that "despite any theoretical objections to the contrary, it remains true that customary international law lays down the rule that a party who seeks release from a treaty on the ground of a change of circumstances has no right to terminate the treaty unilaterally, and that recognition that the doctrine is applicable must be obtained either from the parties to the treaty or from some compe-

<sup>49</sup> Hertslet, *op. cit.*, III, pp. 1898-1900.

<sup>50</sup> *Ibid.*, p. 1904; British and Foreign State Papers, LXI, pp. 1198-1199.

<sup>51</sup> Hertslet, *op. cit.*, III, pp. 1920, 1922; British and Foreign State Papers, LXI, pp. 7-11.

<sup>52</sup> M. O. Hudson, *International Legislation*, IV, p. 2378 (Art. 10).

<sup>53</sup> Cf. Dupuis, "Les Relations Internationales," *Académie de Droit International, Recueil des Cours*, II, pp. 340-341.

tent international authority." <sup>54</sup> The draft convention on the law of treaties, formulated by the Harvard Research in International Law in 1935, rejects the right of unilateral denunciation, although it allows a right of provisional suspension pending a decision by a competent international tribunal or authority to which the question of non-performance must be submitted at the request of the complaining party. Such suspension of performance, however, would be undertaken by the complaining party at its own risk. In case the decision sustains the allegations of the complaining party as to the guilt of the other party or parties, the provisional suspension may become definitive termination; if the decision is to the contrary, the party suspending performance may itself be held liable for failure to perform its treaty obligations. <sup>55</sup>

In the light of the above discussion, it is believed that, irrespective of the merits of its cause, the German Government is to be censured for attempting by its own independent act to terminate its obligations under Part V of the Treaty of Versailles. (And it is submitted that if that part of the treaty is in fact terminated, it must be because the other parties agree to such termination expressly or by implication, and not because of the unilateral denunciation by Germany. <sup>56</sup>) In a case where political exigencies make it impossible to resist actual termination of performance, and where as a result termination of the treaty itself in whole or in part may perhaps be considered as resulting from tacit agreement of the parties, this may be said to be a distinction without a difference. It is a distinction which has juridical importance, however, and one which should not be lost sight of because of possible future cases. (The German case should not, therefore, be interpreted as a precedent establishing the right of a state unilaterally to abrogate a treaty to which it is a party because of alleged violation or non-performance thereof by another party or parties.)

<sup>54</sup> C. Hill, "The Doctrine of *Rebus Sic Stantibus* in International Law," University of Missouri Studies, Vol. IX, No. 3, p. 78.

<sup>55</sup> See Article 27 of the Harvard Research draft convention on the law of treaties, and comment thereon, published as a supplement to this number of the JOURNAL.

<sup>56</sup> Thus Great Britain, by conceding in her naval agreement of June 18, 1935, with Germany (text in New York Times, June 19) Germany's right to maintain naval forces in excess of those permitted by the Treaty of Versailles, in effect acquiesces in the German repudiation of the naval clauses. If, therefore, those clauses are terminated so far as Great Britain and Germany are concerned, it may be said that they have been terminated by agreement, not by Germany's unilateral action in pretending to repudiate them.

**THE DEVELOPMENT OF INTERNATIONAL TAX LAW:  
FRANCO-AMERICAN TREATY ON DOUBLE TAXA-  
TION—DRAFT CONVENTION ON ALLOCATION  
OF BUSINESS INCOME**

BY MITCHELL B. CARROLL \*

The exchange of ratifications on April 9, 1935, of the Franco-American Convention on Double Taxation by Ambassador Straus and Foreign Minister Laval calls attention to the development of a new field of law in which the United States has been participating since the post-war depression. International double taxation had existed for some time before the World War as the result of countries taxing income whether derived by non-residents from local sources or by residents from foreign sources, but it did not become a serious problem until the budgetary exigencies of the World War had caused such an increase in rates that the payment of taxes to the foreign country, as well as to the home country, resulted in taking practically all of the income from carrying on business in the two. Likewise, serious double taxation existed in the field of property and estate or inheritance taxes as the result of countries taxing property having a local situs as well as property having a foreign situs but belonging to persons domiciled within their territory.

As selling in foreign markets was essential to the restoration of prosperity in the United States, our Congress took the wise step of providing in the 1918 Revenue Act (Sections 222 and 238) that American citizens and corporations (and also resident aliens on condition of reciprocity) could take against their American tax on total net income a certain credit for taxes paid abroad on foreign income. At that time shipping enterprises carrying freight or passengers to various ports were subject to tax in each country, but as the transportation service was rendered on the seas which belonged to no country, it was almost impossible properly to determine how much net income was actually derived in each jurisdiction. Having in mind the importance of encouraging American shipping as well as the tax difficulties just described, Congress inserted in the Revenue Act of 1921, Section 213 (b) (8), an offer to exempt the earnings "derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States."

Various foreign countries were in the same period adopting fairly similar

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measures to alleviate the burden of home taxes on citizens or companies with investments or business abroad. The government of the country of which the taxpayer was a national, or in which he had his fiscal domicile, restricted its taxing power in favor of the foreign country where the income had its source. However, tax systems differed greatly, definitions of source or situs varied, principles of jurisdiction were not always well established, and it was soon realized that this was a problem that needed international coöperation for its solution. Moreover, some governments were disinclined to give up their tax revenues unless other countries should make reciprocal sacrifices.

The International Chamber of Commerce denounced the paralyzing effects of double taxation on international trade and in 1920 appointed a committee that has since coöperated with successive committees of the League of Nations in formulating solutions which tend to be based on uniform principles. The first stage of this work culminated in 1928 at a conference of experts representing twenty-eight governments with the formulation of draft bilateral conventions for the prevention of double taxation—that is to say, the draft conventions concerning income taxes defined sources of income and determined whether the country of the source of the income or the country of the fiscal domicile of the recipient should have exclusive or partial jurisdiction over each item of income.<sup>1</sup> For example, as regards business profits, the principle embodied in these conventions is that income from industrial and commercial enterprises shall be taxed wherever there is a permanent establishment and that, if the enterprise has establishments in two countries, each country shall tax the portion attributable to the permanent establishment within its territory. Another draft deals with prevention of double taxation in the field of death duties, and two others with administrative and judicial assistance in the assessment and collection of taxes.

Concurrently with the work at Geneva, which was being carried on largely by the heads of the tax administrations of leading European countries, a series of agreements were adopted by pairs of European states which reflected the influence of the Geneva meetings. Except for one between Great Britain and the Irish Free State, which provided for exemption of income at source and its taxation only at fiscal domicile, most of these agreements may be characterized broadly as defining sources of income, providing whether the various items of income (*e.g.*, dividends, interest, royalties, business profits, salaries, etc.) are to be taxed exclusively at source or at the fiscal domicile, or, if certain items are to be taxed by priority at source, the agreement states what relief is to be given against the tax at fiscal domicile.

In general, definitions of the various sources of income were as follows: The source of dividends was defined as the real center of management, or statutory seat, of the company paying them; the source of interest as the residence of the debtor; the source of salaries as the place where earned, except that

<sup>1</sup> Report of the General Meeting of Government Experts on Double Taxation and Tax Evasion, League of Nations Document C.562.M.178.1928.II.

government salaries should be taxed only by the paying government; the source of business profits as the permanent establishment (*e.g.*, factory, or sales office) which produced them. Some treaties provided that patent and copyright royalties, annuities and similar items should be exempted at source and taxed exclusively by the country in which the recipient had his fiscal domicile. Other treaties dealt with property and inheritance taxes and with mutual assistance in the assessment and collection of taxes.<sup>2</sup>

In short, despite the incredible differences in the various tax systems, through the reports of the Geneva meetings and the treaties concluded, fair concepts of fiscal jurisdiction were being established, uniform definitions were being formulated, the predominant kinds of income were being classified, and an international tax language was being developed.

The broad outlines of this movement have been hurriedly drawn in order to afford a background to the discussion of, first, the Franco-American Convention on Double Taxation, and, secondly, the draft convention on the allocation of business income. The former is the first bilateral treaty of its kind to which the United States is a party, and although reciprocal in form, it does not cover the whole field of double income taxation as the above-mentioned treaties have usually done, but deals primarily with the basic principles for taxing the income of American corporations operating in France through branches or subsidiaries, and covers only a few other classes of income. Nevertheless it embodies the language and a number of the basic principles adopted at the Geneva meetings and followed in many of the bilateral treaties. The draft allocation convention, which is the latest work of the Fiscal Committee, could supplement, if adopted, the general principles contained in a bilateral treaty such as that between France and the United States by introducing rules for allocating business income to the interested states, or it could be adopted independently as a bilateral or multilateral convention for establishing a régime of equitable taxation for business enterprises operating in two or more states.

#### THE FRANCO-AMERICAN CONVENTION

The above-mentioned draft conventions and treaties have all recognized that a state can levy an income tax on a foreign enterprise only in respect of income derived from local sources, *i.e.*, in the case of a foreign company with a local subsidiary, the latter is to be treated as an independent legal entity and the parent bears tax only on the dividends, interest, or royalties in the same manner as would any foreign company deriving such income from a local company. The business profit actually derived by the subsidiary belongs to it, however, and not to the parent company.

The Franco-American Convention on Double Taxation is significant because it deals with a case where a tax administration had extended its arm

<sup>2</sup> Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion, League of Nations.

in order to reach dividends and interest paid by a company wholly without French jurisdiction because such income was deemed to have been derived by the foreign company through the mere fact of having a controlling interest in a French company. The American parent corporation was thereby subject not only to the double taxation resulting from having dividends received from the French subsidiary subject to tax first in France by withholding at source and then being included in its own taxable profit, but also to the triple taxation resulting from France taxing also a proportion of its dividends distributed in America. In other words, the same income was subject to the United States tax once and to the French tax twice. The provision in the United States Revenue Act to prevent normal double taxation permitted the American corporation to credit, within limitations, the French tax withheld at source on French dividends against the American tax on total net income. Relief from the second French tax could be obtained only through obtaining its renunciation in France.

The so-called French dividend tax was introduced by the law of June 29, 1872, which imposed a small tax on the payment in France of dividends and interest by French companies. Article 4 of this same law imposed an equivalent tax on the shares, bonds and loans of foreign companies. The tax was essentially a levy on the payment in France of income from securities. In order to avoid this levy certain French interests were reported to have organized in a neighboring country companies which, in turn, opened branches in France. As the dividends and interest were then not paid in France, no tax should be due. The French administration thwarted this simple expedient by issuing, on December 6, 1872, an administrative decree which provided in Article 3 that foreign companies whose shares were not quoted in France but had for their object movable or immovable property situated in France were liable to the tax on income by reason of the French property belonging to them, and should pay this tax on a proportion of their capital as fixed by the Minister of Finance. They should, for this purpose, cause to be approved by the Minister of Finance a French representative who would be personally responsible for all taxes and fines.

Subsequently, it was provided that the tax should be imposed on the same proportion of dividends and interest paid by a foreign company as its assets in France bore to its total assets. The term "assets" was interpreted to include all forms of real and personal property and business turnover, a special commission selecting the factors that it considered most appropriate for determining the taxable quota of dividends and interest of the foreign company. Thus there was imposed on a foreign company with a branch in France a tax measured by the amount of income distributed abroad by the head office which was arbitrarily deemed to have been derived from French sources. The levy was extraterritorial and admittedly arbitrary (*forfaitaire*).<sup>3</sup> The only justification was to impose on foreign companies with

<sup>3</sup> Taxation of Foreign and National Enterprises, Vol. I, pp. 81 and 95, League of Nations.

branches in France a tax equivalent to that paid by French companies operating in France. The decree was criticized at the time as being unconstitutional<sup>4</sup> because it extended the application of the law of June 29, 1872, beyond its original scope, but it stood. To avoid the consequences of having to submit the head office abroad to French fiscal control, foreign companies caused to be organized separate French companies to carry on their operations in France.

A certain Swiss company, however, taking advantage of the fact that the dividend tax is not due in the case of distributions on shares in a French partnership (*société en nom collectif*), organized with two of its directors a partnership to operate a factory in France. In the act constituting the French company the Swiss company reserved to itself the firm's signature in the same capacity as its two associates and allotted to itself eighty per cent of the profits and losses. The Court of Cassation, in a decision rendered July 29, 1913,<sup>5</sup> held that the two enterprises followed an identical purpose and that the Swiss company merely wished to extend its own exploitation to French territory. It stated that the preponderant situation of the Swiss corporation in the new company showed that the factory in France was only a branch of the establishment in Switzerland. In short, the French company was fictitious.

On the basis of this decision the French tax administration was upheld by lower courts in a number of cases where foreign companies in one way or another acquired a controlling interest in French corporations. In one important case a Swiss company, the *Société de Neuhausen*, was held liable by the Tribunal of Marseilles on June 28, 1927.<sup>6</sup> The Swiss company acquired a majority of the stock and of the board of directors of one French company already in existence, and organized another French company over which it exercised a similar control. It purchased from them the bauxite which it used in the manufacture of aluminum in Switzerland. The French tribunal held that the decree of December 6, 1872, envisaged all property acquired in France in order to enable foreign companies to exercise their commercial activity in France or to serve in the objects of their exploitation. The tribunal observed that a foreign corporation might, according to the circumstances, either exploit its property in France directly or exploit it under cover of a company formed under French law in which the foreign corporation owned all or part of the shares. In both cases the foreign corporation would be liable to tax. Although the decree of 1872 did not permit taxation where there was a mere investment, there was no question of an investment when a foreign corporation acquired the majority of shares in a French company engaged in a business similar to its own. The tribunal considered this

<sup>4</sup> Surville and Arthuys, *Droit International Privé* (1916), par. 470 III, p. 688.

<sup>5</sup> Sirey, 1917, I, 142.

<sup>6</sup> *Revue de l'Enregistrement*, March, 1928, 8698, pp. 159-164; *La Semaine Juridique*, January 26, 1928, pp. 124-126.

to be especially true when the foreign corporation had at the same time a majority of votes in the board of directors so that it could direct the affairs of the French company in accordance with its wishes. The tribunal also held that there was no occasion to object that the mines, factories and other industrial elements remained the property of the French company, as it was not the mines or factories that the foreign company must be considered as having possessed in France, but the shares which it had subscribed for or acquired. By the very fact of the preponderance which it was assured in the French company issuing the shares, the foreign company exercised a veritable exploitation in France, and the securities which it held entered, therefore, into the category of movable property envisaged in Article 3 of the decree of December 6, 1872.

From the American viewpoint the leading case was that of the Boston Blacking Company which owned a factory in France and later transferred it to a newly organized French company in consideration of the majority of the registered stock of the latter. When operating the factory itself, the American company paid the tax on income from securities on the taxable proportion of the dividends which it distributed. After the transfer of the factory to the French company, the French authorities maintained that the American company should continue to pay tax on the same basis despite the separate legal existence of the French company and regardless of the fact that the dividends distributed by it to the American company were taxable by withholding at source.

The departmental tribunal of Seine-et-Oise on February 1, 1928,<sup>7</sup> held that the transfer made by the American corporation to the French company of its property in France and the other circumstances relating to the organization of the French company showed that the American company retained this property in the form of shares and continued to exploit it, because the American company did not intend to make a mere investment, and the retention of most of the registered shares assured the control and direction of the French company. The American company thereby exercised a veritable exploitation in France and held securities that came within the category of movable property mentioned in Article 3 of the decree of December 6, 1872.

By virtue of these decisions there was being established with regard to American and other foreign companies with subsidiaries in France a double liability to the French dividend tax: first, the tax (present rates 18% on registered shares owned by a corporation and 24% on bearer shares) was withheld from dividends and interest paid by the French subsidiaries to the foreign parent; second, the tax was assessed directly against the foreign company itself on a certain proportion of the dividends and interest which it distributed in its home country to shareholders or bondholders resident therein. If the indicated control existed, the second tax was imposed even though no

<sup>7</sup> *Revue de l'Enregistrement*, May, 1928, 8734, pp. 329-333; *La Semaine Juridique*, May 3, 1928, pp. 567-568.

income actually passed from the French subsidiary to the American parent. The tax against the American parent corporation itself was obviously an extraterritorial tax; a corporation wholly without French jurisdiction, according to normal conceptions, was being subjected to a French tax on its American distributions of dividends and payments of interest, the said tax having been introduced by the law of 1872 for the purpose of reaching only dividends and interest paid in France, and under the decree of December 6, 1872, for the purpose of reaching a foreign corporation which itself exploited directly property in France.

British, Belgian and Italian companies were likewise brought into assessment. Protests from all sides were made to the French Government. In May, 1930, at the request of Ambassador Edge, a commission composed of the late Dr. T. S. Adams, former Economic Adviser to the Treasury Department, and two Treasury officials, was sent to France to discuss a solution with the French Government, and these conversations resulted in the negotiation during the summer of a treaty, the primary purpose of which was to free American corporations from the liability to pay the dividend tax on the basis of a certain proportion of the dividends and interest paid in the United States. The signature of the treaty was delayed by the French, however, until April 27, 1932. It was thereupon ratified in the United States Senate on June 15, 1932, but no action was taken by the French Government to secure ratification. In the Revenue Act of 1934 there appeared Section 103 which, in substance, doubled the American rate of tax on the citizens and corporations of foreign countries which levied discriminatory or extraterritorial taxes on American citizens. Promptly steps were taken by the French Cabinet to obtain ratification, but the French Chamber of Deputies and Senate did not vote until the winter of 1934, and the exchange of ratifications took place on April 9. The treaty becomes effective on January 1, 1936.

American corporations which have been directly assessed to the dividend tax since May 1, 1930, may free themselves of the assessment by virtue of Article X, provided they elect to come under Article VI of the convention. The last-mentioned article provides that an American corporation will not be subject to direct assessment under Article 3 of the decree of December 6, 1872, "by reason of any participation in the management, or in the capital of, or any other relations with, a French corporation," if such American corporation and the French corporation make a declaration to the Bureau of Registration within six months after January 1, 1936, that they wish to enjoy the benefits of Article VI. In such case the tax on income from securities continues to be levied, in conformity with French legislation, on the dividends, interest and other products distributed by the French enterprise, and also on any profit which the French administration proves to have been diverted from the French company to the American company by dealings other than on an arm's-length basis between the two companies.

The arm's-length test is prescribed in Article IV which reads:

When an American enterprise, by reason of its participation in the management or capital of a French enterprise, makes or imposes on the latter, in their commercial or financial relations, conditions different from those which would be made with a third enterprise, any profits which should normally have appeared in the balance sheet of the French enterprise, but which have been, in this manner, diverted to the American enterprise, are, subject to the measures of appeal applicable in the case of the tax on industrial and commercial profits, incorporated in the taxable profits of the French enterprise.

If an American corporation is not now subject to direct assessment to the tax on income from securities but becomes so related to a French company that the tax would be payable, it may enjoy the benefits of Article VI if it makes the declaration within six months after the acquisition of the participation or the commencement of the relations which would entail said liability.<sup>8</sup>

An American corporation with a branch in France may likewise free itself from having to pay the tax on income from securities on the basis of a certain proportion of the dividends and interest which it pays in the United States by electing to come under Article V. In that event the American corporation would pay the tax on income from securities on three-fourths of the profits actually derived from the French establishments, it being arbitrarily assumed that one-fourth of the profits would not be distributed as dividends but would be used in amortizing capital or replacing plant or machinery. This election must be made within six months after January 1, 1936, or within six months after the creation of an establishment in France.

The effect of these two provisions is to establish clear-cut limitations to French tax jurisdiction: If an American corporation has a subsidiary in France and elects to come under Article VI, the French Government may look only to the subsidiary in order to collect the tax; if an American corporation has a branch in France and elects to come under Article V, the branch is to be treated as an independent entity for tax purposes.

Other provisions in the treaty of fundamental interest are the following:

Article I provides in substance that an enterprise of one contracting state shall not be subject to taxation by the other contracting state in respect of

<sup>8</sup> If an American corporation does not make the declaration, it may be subjected to the dividend tax by direct assessment under Article 3 of the decree of December 6, 1872, but it is nevertheless protected against bearing the double burden of the French tax by virtue of the last paragraph of Article VI, which provides that it will enjoy the same benefits as a French corporation with a French subsidiary under Articles 27, 28 and 29 of the French law of July 31, 1920, and Article 25 of the French law of March 19, 1928, allowing an exemption for dividends distributed by the parent company to the extent they are paid out of dividends or interest received in the same year from its subsidiary, provided the shares or bonds remain registered in the name of the parent. Except for preventing the double payment of the dividend tax, this régime is the same as the one the treaty is intended to remove, and the paragraph in question was included in the treaty merely to protect corporations which failed to make the declaration in the prescribed period.

its industrial and commercial profits except in respect of profits allocable to its permanent establishment in the latter state. Article I also provides that if an enterprise of one contracting state purchases merchandise in the second for the purpose of supplying establishments in the first contracting state, no profit shall be ascribed to such act for tax purposes. This provision was intended to end the French practice of ascribing profits to purely purchasing establishments in France of American enterprises.

Foreseeing the day when airplanes would be carrying passengers and freight between the two countries, Article III provides for reciprocal exemption of income derived from the operation of aircraft registered in one state and engaged in transportation between the two states. This article is modeled after the provision for reciprocal exemption of shipping profits contained in the U. S. Revenue Acts since 1921 (see Sections 211 (b) and 231 (b) of the 1934 Revenue Act). The principle of reciprocal exemption is likewise applied under Article IX to patent and copyright royalties, private pensions and life annuities. In accordance with the principle of diplomatic exemption, compensation paid by one contracting state to its own citizens for personal services rendered in the other contracting state is exempted in the latter state, the former state thereby having the exclusive right to tax the salaries of its own public servants (Article VII). War pensions are subject to a similar provision (Article VIII).

#### DRAFT CONVENTION ON THE ALLOCATION OF BUSINESS INCOME

In the draft conventions formulated at Geneva in 1928, and in most of the bilateral treaties, the provision that in the case of an industrial, or commercial enterprise, each country should tax the income attributable to a local permanent establishment, was followed by the clause that the competent administrations should agree on rules for apportioning the income between the interested jurisdictions. Double taxation could still arise, however, because different countries have different concepts of source and different methods of allocating or apportioning income to local sources. Thus when goods are manufactured in country A and sold in country B, the latter may hold that the entire profit arises in its territory, whereas the country A may contend the bulk of the profit is attributable to the activities carried on in its jurisdiction. To determine the income subject to its tax, country B might apportion the total net income of the foreign enterprise in the ratio of local receipts to total receipts; on the contrary, country A might fix its share of the income as a certain percentage (*e.g.*,  $36\frac{2}{3}\%$ ) of the net income derived from manufacture and sale.

The cases of double taxation of this kind arising from overlapping claims are so many that the Fiscal Committee of the League of Nations, with the help of a grant from the Rockefeller Foundation, instituted a world-wide survey of principles and methods of allocating taxable income now followed in the leading countries, with a view to selecting, if possible, certain prin-

ciples and methods that could be accepted for general application. The results of this survey have been published by the League in five volumes entitled "Taxation of Foreign and National Enterprises." Volume IV contains a synthesis of the law and practice of the various countries, and sets forth the principles and methods of allocation which seem most appropriate for a general solution of the problem.

After preliminary meetings of a special subcommittee in New York and Washington, as guests of the American Section, International Chamber of Commerce, the Fiscal Committee drafted at Geneva in June, 1933, a convention<sup>9</sup> which is based on the recommendations in Volume IV of the survey, and embodies fundamental principles governing the allocation of income for tax purposes in the case of an enterprise carrying on industrial and commercial operations in two or more countries. This draft convention was sent to the various governments, including that of the United States, for their comments and consideration as to whether they would be willing to use it as a basis for international agreements. The replies were considered at the last meeting of the Fiscal Committee in June, 1935, and some slight amendments were made in the original draft.

The fundamental principle embodied in Article 1 is that the contracting state shall tax only income directly allocable to a permanent establishment within its territory. The word "directly" is significant in that it is intended to preclude, *inter alia*, a country in which is located a subsidiary of a foreign company from reaching out and assessing income imputed to a parent or grandparent corporation in another state.

Article 2 defines "business income" by excluding from the income of an establishment of an enterprise dividends, interest, and certain other items which can be attributed to a definite source for tax purposes and do not generally enter into the concept of the "operating income" of an industrial, commercial or banking enterprise.

Furthermore, the convention embodies in Article 3 the concept of treating the local establishment of a foreign enterprise as an independent enterprise, and taxing it wherever possible on the basis of its separate accounts. Thus it provides that "if an enterprise with its fiscal domicile in one contracting state has permanent establishments in other contracting states, there shall be attributed to each permanent establishment the net business income which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions. Such net income will, in principle, be determined on the basis of the separate accounts pertaining to such establishment." This article likewise provides that, when necessary, the fiscal authorities of the contracting states shall "rectify the accounts produced, notably to correct errors or omissions, or to reestablish the prices or remunerations entered in the books at the value which would prevail between independent persons dealing at arm's length."

<sup>9</sup> League of Nations Document C.399.M.204, 1933, F/Fiscal 76.

In the event that books cannot thus be rectified, the article provides for the determination of net income on the basis of a percentage of turnover, and, in the last resort, the use of an appropriate apportionment formula.

Article 4 contains some special provisions regarding the allocation of income of banking enterprises, which in substance assimilate the dealings in money of branches of banks to the dealings in goods of branches of commercial companies and provide for the treatment of interest on interbranch loans and deposits as income to the creditor establishment and a deduction from the gross income of the debtor establishment except in so far as such loans or deposits constitute the permanent capital of the branch.

Article 5 embodies the principle, which is an exception to the general rule advocated for business enterprises and is now almost universally applied by maritime countries, namely, that income from the operation of ships should be taxed only by the country in which the fiscal domicile of the enterprise is situated. It also extends this principle to air navigation enterprises.

Article 6 provides that a local subsidiary of a foreign company shall be treated as an independent entity and that if the tax authorities can show that any profit has been transferred from a subsidiary to the parent by dealings on other than an arm's-length basis, such profits are to be reentered in the books of the subsidiary and no proceedings are to be taken against the parent company.

Most of the leading commercial countries have indicated their willingness, with qualifications in some instances, to enter either into negotiations on the basis of this draft convention for the purpose of concluding a multilateral treaty, or, in any event, bilateral agreements. From the viewpoint of the United States, the conclusion of such a treaty would complete the provisions for relief from double taxation now contained in Section 131 of the Revenue Act by establishing uniform criteria as to the amount of the income of an enterprise which is allocable to another contracting state, and in respect of which the foreign tax may be credited against the United States tax. Furthermore, the execution of the Franco-American Double Taxation Treaty would be facilitated if the two governments likewise adopted the allocation convention because the rules for the allocation of taxable income contained therein would aid in applying the basic principles of jurisdiction embodied in the present treaty.

To conclude, the United States is helping to develop a new field of law, which, in Europe, is called "international tax law." The importance of this movement from the viewpoint of international trade is shown by the fact that it was begun during the post-war depression and that its progress has been especially rapid during the recent depression, fourteen general conventions having been concluded in the five years which have elapsed since June, 1930.<sup>10</sup>

<sup>10</sup> Fiscal Committee Report to the Council on the Fifth Session of the Committee, June 17, 1935 (C.252.M.124.1935.II.A).

In the light of principles worked out through meetings of representatives of different countries, various states are limiting their fiscal sovereignty so as to prevent the cumulation of excessive levies on persons and companies engaged in international business or having investments in foreign countries. The admission of our products into foreign markets is being facilitated by the conclusion of reciprocal tariff treaties, but obviously the position of our enterprises abroad would be more secure if the Franco-American treaty were followed by the negotiation of agreements with foreign countries which would have as their purpose the removal of such trade impediments as discriminatory and extraterritorial taxes, and the assurance of an equitable régime of taxation.

## THE BALTIC STATES AND THE SOVIET UNION

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The development of political relations between the Baltic States and the Soviet Union has passed through two distinctive stages. The first began with the conclusion of treaties of peace signed in 1920 between Estonia, Lithuania, Latvia and Finland, and the then Russian Socialist Federated Soviet Republic. By the terms of these treaties Soviet Russia renounced all its previous rights of sovereignty over the territory of the Baltic States and unreservedly recognized their independence.

The second stage began with the signature of the so-called non-aggression and security pacts between Lithuania and the Soviet Union in 1926, and between the U.S.S.R. and Finland, Latvia and Estonia in 1932.

With the conclusion of the non-aggression pacts, there began the stabilization of political relations, a thing which was naturally of the greatest significance, not only for the Baltic States themselves, but also for Eastern European politics. It is believed that an exposition of the international legal bases of these political treaties may serve to impart a better understanding of Eastern European problems.

An essential preliminary to such an exposé is a brief survey of the distinctive, as well as the common provisions, for Estonia, Lithuania, Latvia and Finland in their treaties concluded with Soviet Russia. The content of these treaties will, therefore, be subjected to a juridical examination, particularly as regards their political provisions.

The treaties of peace<sup>1</sup> between Soviet Russia and her Baltic neighbors found common solutions for a number of questions, chief among which are:

(1) The recognition of the independence and autonomy of Estonia, Lithuania, Latvia and Finland; unreserved renunciation of all sovereign rights of Russia with regard to the Baltic States, and release of these states from all obligations resulting from their former membership in the Russian Empire.<sup>2</sup>

\* Translated from the original German by Professor Malbone W. Graham, of the University of California at Los Angeles, assisted by Dr. Margaret Ball, of Vassar College. The translators incur no responsibility for the views expressed in the article.

<sup>1</sup> The treaties of peace, hereinafter cited as the Estonian, Lithuanian, Latvian and Finnish "treaties," are, in chronological order: (1) the Treaty of Tartu, Feb. 2, 1920 (11 League of Nations Treaty Series, 51); (2) the Treaty of Moscow, July 12, 1920 (3 League of Nations Treaty Series, 122); (3) the Treaty of Riga, Aug. 11, 1920 (2 League of Nations Treaty Series, 213); and (4) the Treaty of Tartu (Dorpat), Oct. 14, 1920 (3 League of Nations Treaty Series, 6).

<sup>2</sup> Art. 1 of the Lithuanian, Art. 2 of the Latvian and Estonian, and the preamble of the Finnish treaties.

(2) The boundary questions between Soviet Russia and the Baltic States were naturally determined individually<sup>3</sup> with regard to the geographical position and the conditions of each separate state at that time; however, these questions were all solved in the same modus.<sup>4</sup>

(3) The non-admission to the territory of the contracting parties of organizations and troops hostile to the Soviet or Baltic States, as well as the prohibition of transit of troops and military armaments of parties at war with Soviet Russia through the territories or harbors of the Baltic States.<sup>5</sup>

(4) The obligation of the R.S.F.S.R. to recognize the permanent neutrality of Estonia, Lithuania and Finland in the event that it should receive international recognition.<sup>6</sup>

Among specific stipulations of the individual treaties, the following from the Lithuanian treaty deserve consideration:

(1) The solution of the Lithuanian-Polish boundary question is left to direct negotiation between those two states.<sup>7</sup>

(2) Article 16, paragraph 1, declares that the parties have never been at war with one another.<sup>8</sup> Herein Article 1 contrasts with Article 1 of the Latvian, Estonian and Finnish treaties, in which reference is made to the cessation of warfare. Notwithstanding, the treaty is inappropriately called a Treaty of Peace.

In the Latvian, Estonian and Finnish treaties, the following special provisions should be mentioned:

(1) Article 1 of the first two treaties stipulates that from the day on which the treaties enter into force, the state of war between them and Soviet Russia shall be terminated.

(2) Article 13 of the Finnish treaty contains provisions concerning the military neutralization of the islands in the Finnish Gulf belonging to Finland.

Article 14 of the same treaty contains provisions concerning the immediate military neutralization of the Aaland Islands under international guarantee, after the treaty goes into effect. Soviet Russia obligates herself to see to

<sup>3</sup> Art. 3 of the Latvian and Estonian treaties.

<sup>4</sup> Except as regards Lithuania, whose territory was partially occupied by Polish troops during the peace negotiations.

<sup>5</sup> Art. 4 of the Lithuanian and Latvian, and Art. 7 of the Estonian treaties.

<sup>6</sup> Art. 5 of the Lithuanian and Estonian treaties, and Arts. 12, 13, 14, 15 of the Finnish treaty. In this connection, Art. 12 is of chief importance. In it, Finland and the Soviet Union declare that they agree in principle to the neutralization of the Gulf of Finland and of the Baltic Sea, and obligate themselves to cooperate for the assurance of this neutralization. It is clear, however, that the neutralization of the Gulf of Finland (which surrounds the territory), and of the Baltic Sea, would carry with it the neutralization of the territory of Finland. This neutralization would be valid with regard to Sweden and Russia, Finland's neighbors, only after their recognition thereof.

<sup>7</sup> Art. 2, note 1.

<sup>8</sup> Since a formal state of war had never existed between Lithuania and Soviet Russia.

the maintenance of this guarantee. Article 16 of the treaty speaks of the neutralization of Lake Ladoga.

After this survey, the examination of the non-aggression pacts<sup>9</sup> which the Soviet Union has negotiated with the Baltic States, and which definitely represent a continuation and development of the political provisions of the peace treaties will be facilitated.

Since Lithuania was the first Baltic State to conclude such a pact with the Soviet Union, the provisions of its treaty will first be examined from an international legal standpoint.

Article 1 states that the provisions of the peace treaty remain in force and serve as a basis for the relations between Lithuania and Russia. This article is of great political significance, especially in so far as it concerns the question of the territorial sovereignty of Lithuania, as laid down in Article 2 of the peace treaty,<sup>10</sup> and according to which the contracting parties obligate themselves reciprocally to respect the sovereignty and integrity of each other under all circumstances.<sup>11</sup>

Article 3, paragraph 1, containing the obligation of the contracting parties not to attack each other, makes Article 2 more concrete. Article 5 provides for the settlement of conflicts by means of a conciliation commission, the composition, rights and procedure of which are to be determined by a special agreement.<sup>12</sup> Articles 7 and 8 contain provisions for the ratification and the duration of the validity of the pact.

Article 3, paragraph 2, and Article 4 of the Lithuanian Pact contain the neutrality clauses. These are as follows:

Art. 3, par. 2: Should one of the contracting parties, in spite of its peaceful conduct, be attacked by one or more outside Powers, the other contracting party binds itself not to aid the one or more outside Powers in their struggle against the contracting party which has been attacked.

<sup>9</sup> These non-aggression pacts, which will hereinafter be cited as the Lithuanian, Finnish, Latvian and Estonian "pacts," bear the following dates in that order: (1) Pact of Moscow, Sept. 28, 1926 (120 League of Nations Treaty Series, 145); (2) Pact of Helsingfors, Jan. 21, 1932 (Soviet Union Review, March, 1932, 58); (3) Pact of Riga, Feb. 5, 1932 (*Ibid.*, 59); (4) Pact of Moscow, May 4, 1932 (131 League of Nations Treaty Series, 297).

<sup>10</sup> The boundary line, which was laid down by the above-mentioned treaty, was in accordance with the ethnographic, historical and cultural claims of Lithuania, including the Vilna territory and a part of the Grodno territory.

<sup>11</sup> This sentence presents, on the whole, nothing new. What is to be understood by "under all circumstances" is not indicated. The expression might be interpreted to mean that the contracting parties would not attack each other, even if the internal political situation should have changed, *e.g.*, if a revolution broke out, or other extraordinary happenings should have occurred.

<sup>12</sup> The question of settlement was handled similarly in the German-Russian Treaty of Berlin, hereinafter cited as Treaty of Berlin of April 24, 1926. For various reasons Lithuania, like Germany, would at that time have had to postpone the completion of the convention. Latvia, Estonia, and Finland, failing until 1932 to bring to a successful conclusion the negotiations begun in 1926, finally signed the conciliation convention at the same time that the non-aggression pacts were concluded.

Art. 4: Should a political agreement be concluded between outside Powers, which is directed against one of the contracting parties, or, should a coalition be formed by outside Powers for the purpose of inflicting an economic or financial boycott upon one of the contracting parties, as the result of a conflict of the type referred to in Article 3, paragraph 2, or even at a time when neither of the contracting parties finds itself in an armed conflict, the other contracting party will not join such an agreement or combination.

These articles correspond in content to Articles 2 and 3 of the Treaty of Berlin, containing a so-called limited neutrality clause,<sup>13</sup> which to some extent served as a precedent for the Lithuanian Pact.

These involve a neutrality obligation in the event of attack by one or more third Powers on one of the contracting parties, despite the peaceful conduct of the latter. Thus Germany as well as Lithuania would only have to maintain neutrality in the event of a conflict between Russia and a third Power if Russia were attacked;<sup>14</sup> not, however, if Russia were the attacking party.

We shall now examine whether this limited neutrality clause, which has found expression in the Lithuanian Pact, is compatible with the duties of Lithuania as a member of the League of Nations. It is first necessary to take note of the provisions of the Covenant of the League of Nations concerning treaties inconsistent with Articles 20 and 21 of that document. Article 20 states only generally that the Covenant abrogates obligations and understandings *inter se* which are inconsistent with its provisions. According to Article 21, the Covenant is not deemed to "affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace."

It is not clear from these provisions whether so-called security and non-aggression pacts are compatible with the provisions of the Covenant. It is therefore necessary to examine those articles of the Covenant, *i.e.*, Articles 16 and 17, which directly refer to the obligations of the League members.<sup>15</sup> Paragraph 3 of Article 17 is of particular importance, for only after the refusal of the non-member state to accept the invitation of the Council to effect pacific settlement, are the sanctions provided in Article 16 applicable. Thus, in such a contingency Lithuania would only have to examine the question of the compatibility of the obligations toward the League of Nations under Article 16 with those towards the Soviet Union under Article 3, paragraph 2, and Article 4 of the pact, if the attempted interposition on the part of the League of Nations Council on the basis of Article 17, para-

<sup>13</sup> That is, an obligation of neutrality valid only under certain conditions or circumstances, in contrast to the unconditional obligation to remain neutral, characteristic of a neutralized state. Compare Jašcenko, *International Law*, Kaunas, 1931 (in Lithuanian), 160 ff.

<sup>14</sup> Lithuania would not even be able to join in a treaty directed against the Soviet Union, whereas no comparable provision was contained in the Treaty of Berlin.

<sup>15</sup> So long as the Union of Soviet Republics was not a member of the League of Nations, and therefore had no obligations toward it, Art. 17 of the Covenant alone was involved.

graph 3, of the Covenant were unsuccessful, and the U.S.S.R. should proceed to make war on a member of the League.

It follows further from this that the sanctions of Article 16 of the Covenant can only be applied:

- (1) If the U.S.S.R. refuses the invitation of the League of Nations;
- (2) If it proceeds to make war on a member of the League, namely, when it is the aggressor. But if the Soviet Union, in spite of having refused the invitation of the League of Nations, does not go to war, *i.e.*, if it remains passive, no use can be made of sanctions.

It is clear that in the application of intervention measures no member of the League can appeal to its neutrality. Any exceptions whatsoever are, *a priori*, inadmissible in this regard. This unconditional participation in sanctions is inherent in the conception of the League of Nations as a collaborative community and is inseparable therefrom. It would therefore be impossible for Lithuania, in the event of a sudden war of aggression by the Soviet Union on a member of the League, under any circumstances to invoke its neutrality and therefore to decline to participate in sanctions. Lithuania's neutrality clause is, then, a limited one in the sense that it is valid only in case of an attack on the Soviet Union. Consequently, the measures in which Lithuania would have to participate under Articles 16 and 17, would arise only if the Soviet Union were the aggressor.

It may be concluded that the neutrality clause of the Lithuanian pact would *theoretically* never under any circumstances conflict with Lithuania's obligations towards the League of Nations under Article 16.

In the practical application of the provisions of Articles 16 and 17 of the Covenant the decision as to which party is the aggressor is particularly difficult. How can this be determined? According to the Lithuanian pact, there are three indicia of aggression: (1) if one of the contracting parties, in spite of its peaceful demeanor, is attacked by one or more third Powers; (2) if a peace-time coalition is formed between third Powers with the object of inflicting an economic or financial boycott upon one of the contracting parties; (3) if a political agreement aimed at one of the contracting parties is concluded between several third Powers.<sup>16</sup>

Practically, some difficulty might arise for Lithuania in determining the question whether a treaty is really directed against Russia. The Soviet Union could hardly consider a convention with regard to disarmament to be directed against her and demand that Lithuania not adhere to it, unless the convention should make provision for participation in the application of distinctly hostile measures. The determination of the "hostility" of such a treaty would not, however, rest solely with the Soviet Union; Lithuania, too, could apply her own interpretation, and eventually a decision on the matter would be reached by the mixed Conciliation Commission. The

<sup>16</sup> Art. 3, paragraph 2; and Art. 4. Of these three indicia of aggression, only the first two appear in the Treaty of Berlin (Arts. 2 and 3). The third element is lacking.

third case would then only be a special form of the second. In any event, Lithuania could make use of a one-sided solution of this question.

That this independent right of examination belongs to each individual government, was clearly expressed in the report accepted by the First Assembly of the League (in its eighteenth plenary session, December 10, 1920).<sup>17</sup> The same interpretation was confirmed by the Second Assembly (in its fifth and sixth Resolutions).<sup>18</sup> It is possible that this independent right of examination of the presence of an offensive war could occasion differences of opinion. To avoid this possibility, the Second Assembly decided to amend Article 16 so that the Council shall render an opinion as to whether the war in question is an offensive one or not. This opinion is intended, to a certain degree, to bind the individual members. The amendment has not as yet been adopted.

However, in the exchange of notes accompanying the pact, there is a sentence also contained in the German-Russian exchange, susceptible of obliterating the difficulties which might arise in the determination of an aggressive war. Lithuania, as Germany, declares that the League of Nations, according to its basic principles, is called upon to settle international disputes peacefully and justly.

In the light of this interpretation, it may be taken for granted that the League of Nations could not, prior to Russia's admission thereto, under any circumstances have been used as the tool of any Power for the purpose of aggression against Russia.<sup>19</sup>

At the time of the signing of the Lithuanian pact, the then Minister of Foreign Affairs of Lithuania, Dr. Šleževičius, declared in a note to the Commissar of Foreign Affairs of the Soviet Union, that the Lithuanian Government was of the opinion that, in consideration of the geographical situation of Lithuania, the obligations of Lithuania resulting from her membership in the League could not prejudice the desires of the Lithuanian people to observe that neutrality which it deemed most suitable to its interests. It is believed that this declaration does not conflict with the Covenant or with the spirit of the League as a peace-abiding community of nations, for, by a resolution of the Fourth Assembly, it was stated that the obligation to render military assistance is limited, and that due regard must be had for

<sup>17</sup> League of Nations, Records of First Assembly, Plenary Meetings, 399.

<sup>18</sup> Records of the Second Assembly, Plenary Meetings, 453.

<sup>19</sup> The first two paragraphs of the Lithuanian note read as follows: "The two Governments have examined the basic questions involved in Lithuania's membership in the League of Nations. The Lithuanian Government, in the negotiation of the treaty and in its signature, has been guided by the interpretation that the principle laid down in Article 4 of the treaty, of non-participation in future political agreements of third powers directed against one of the contracting parties, could not stand in the way of the fulfillment of those duties arising for Lithuania out of the Covenant of the League of Nations. The Lithuanian Government is convinced that the membership of Lithuania in the League of Nations can not constitute an obstacle to the friendly development of relations between Lithuania and the Union of Socialist Soviet Republics."

the geographical position and special conditions of each state. The same conception underlies the interpretation which the Allied Powers gave to Article 16 of the Covenant in Annex F to the Locarno Treaties, according to which the obligations which arise for members of the League from this article are to be understood to mean: "that every member of the League is bound to coöperate loyally and effectively, in order to create respect for the Covenant, and to oppose every act of aggression in so far as compatible with its military situation and taking into account its geographical position." This interpretation of Article 16 of the Covenant of the League of Nations is presumably valid for each member of the League, hence also for Lithuania. In the practical application of Article 16, Lithuania could well appeal with as much right as Germany to her geographical position. Hence, under no circumstances could the Šleževičius declaration be considered a violation of the Covenant.

Pre-existing international law offers a number of treaties which contain not only *neutrality clauses* but also *clauses of alliance*. Apart from the Treaty of Berlin which, in spite of its neutrality clause, did not prevent Germany's joining the League of Nations, the Italian-Yugoslav Treaty of Amity of January 27, 1924, should be mentioned as a first precedent. This treaty contained a neutrality clause (Article 2) which is not so precisely formulated as that of the Treaty of Berlin or of the Lithuanian pact. However, it also contained an express clause of alliance (Articles 1 and 3), which is in conflict with the Covenant, as Schücking and Wehberg<sup>20</sup> rightly maintain, for this system of alliances contravenes basic principles, and the special interests of the contracting parties are placed above the aims of the organized community of nations. Nevertheless, the several treaties of this type concluded since the war between members of the League have elicited no doubts on the part of the organs of the League or of its individual members as to their fundamental validity.

That does not, naturally, *per se*, justify the alliance clauses; however, "this promise of neutrality . . . appears harmless considering the promise contained in most treaties of alliance, of reciprocal aid in the event that one of the contracting parties is attacked."<sup>21</sup>

In the light of the foregoing, it may be concluded that the Lithuanian Pact of September 28, 1926, does not in any way conflict with the provisions of the Covenant of the League of Nations.<sup>22</sup>

<sup>20</sup> Schücking-Wehberg, *Die Satzung des Völkerbundes* (1924), p. 668.

<sup>21</sup> *Ibid.* Cf. also, "La Neutralité germano-russe," *Journal de Genève*, No. 107, April 26, 1926.

<sup>22</sup> Compare the discussion by v. Twardowski in the *Wörterbuch des Völkerrechts und der Diplomatie* under the heading "Wilna-Konflikt," 527-529, concerning the treaty's incompatibility with the provisions of the Covenant of the League of Nations. This, like the political significance of this treaty, appears to me to be entirely unfounded. First, as regards the apparent incompatibility of the non-aggression pact with the Covenant, the basic thesis of v. Twardowski is unacceptable because his examination of the question rests more

The negotiations for the conclusion of the Latvian Pact were begun at the same time as those of the Lithuanian Pact, but lasted longer for two reasons. In the first place, the Latvian Government was of the opinion that the neutrality clause of the suggested treaty was not compatible with Latvia's obligations towards the League of Nations, since the attempts of Lithuania and Germany to remove the legal and political difficulties which arose in the solution of this question did not appear to Latvia to be sufficient to really reconcile its duties as a member of the League to those arising from the pact with the U.S.S.R. The second difficulty was the question of an arbitral tribunal. This was solved in the Lithuanian Pact by the stipulation that "in the event that differences should arise between the contracting parties, which are incapable of settlement by diplomatic means, the contracting parties agree to appoint Conciliation Commissions to this end." The composition, rights and procedure of this commission were to be laid down in a special convention to be concluded. The Latvian Government, however, was of the opinion that possible disputes between the contracting parties should be decided by a court of arbitration, since a conciliation commission composed solely of representatives of both states would hardly be in a position to end disputes. It favored instead, as the sole possible means of adjustment, a court of arbitration with a third neutral judge participating. The representatives of the Soviet Union replied, however, that because of basic differences between the political and social structure of Soviet Russia and that of other states, the Soviet Union would hardly intrust to a bourgeois judge the solution of her disputes with a bourgeois state. Hence Russia insisted upon a conciliation commission in which both parties would have the same rights and which would endeavor to settle all possible disputes by direct negotiation, in so far as they could not be solved by diplomatic means. The Soviet Union refused throughout to consider a court of arbitration. Therefore, despite the fact that the representatives of Latvia and Soviet Russia came to an agreement on other points, particularly regarding the neutrality clause, and initialed the pact by the former early in 1927, the signing of the pact was postponed for almost five years. This delay was naturally not caused by the failure to agree on the question of the court of arbitration alone, but also by the existing political conditions in eastern Europe.<sup>23</sup>

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on political than international law foundations. His political evaluation of the treaty is untenable, since the coup d'état of Dec. 17, 1926 had absolutely nothing to do with the non-aggression pact of Sept. 28, 1926. On the contrary, after the coup of Dec. 17, 1926 in Lithuania, Professor Waldemaras included the neutralization principle in his foreign policy program and upheld it on the basis of the non-aggression pact already signed with the Soviet Union.

<sup>23</sup> The much-talked-of "Eastern Locarno," the creation of which appeared to be closely bound up with the realization of a large Baltic alliance, was at that time under discussion. It was therefore felt that the non-aggression negotiations should not be carried on by individual states, but by the alliance as a whole.

The pact between Latvia and the Soviet Union was not signed until February 5, 1932, and was ratified on June 21, 1932.<sup>24</sup> A convention on conciliation procedure was annexed, in which the settlement of possible disputes was intrusted, from case to case, to a conciliation commission yet to be determined. Latvia, therefore, in the last analysis, had to acquiesce in the Russian standpoint on this question.

A certain similarity in content to the Lithuanian pact should be first noted. In the preamble to the pact, as in the Lithuanian Pact, reference is made to its chief purpose, *i.e.*, to contribute to the common peace through coöperation and the development of friendly relations. The Latvian preamble declares, *inter alia*, that Latvia's peace treaty with Russia remains the basis for the relations between the two countries;<sup>25</sup> that the international obligations previously undertaken by both contracting parties may not conflict with the reciprocal peaceful relations of both parties or with the present pact; that the pact is to be considered as supplementary to, and in fulfillment of, the Kellogg-Briand Treaty of August 27, 1928 for the Renunciation of War.

Article 1 of the Latvian pact obligates each of the contracting parties to abstain from any kind of aggressive acts against the other party, as well as from any violent actions against the integrity and territorial inviolability, or political independence of the other contracting party, regardless of whether such aggression or such measures occur with or without the participation of other states, with or without a declaration of war.

According to Article 2, both states obligate themselves not to participate in any political or military treaties, conventions or agreements directed against the independence, territorial integrity, or political security of the other side, or in treaties, conventions or agreements concluded for the purpose of imposing an economic or financial boycott on one of the contracting parties.

Article 3 stipulates that the obligations undertaken by the contracting parties in accordance with the preceding articles of the treaty, may not violate or alter the international legal rights and duties assumed by them in virtue of previously concluded treaties, in so far as these obligations do not contain clauses of aggression within the meaning of this treaty.

Article 4 imposes on the contracting states, with regard to the duties which they have undertaken by virtue of this treaty, the obligation to submit to a conciliation commission for settlement<sup>26</sup> all disputes, without regard to kind or origin, which might arise after the treaty goes into effect, and which cannot be settled by diplomatic means within a reasonable time.

<sup>24</sup> The publication of the pact occurred on July 5, 1932, in the Latvian official organ, *Valdybas Vestnesis*, No. 146.

<sup>25</sup> This stipulation is not contained in the preamble, but in Art. 1 of the Lithuanian treaty.

<sup>26</sup> The activity of the conciliation commission is, according to the pact, to be determined by a convention to be concluded; however, the conciliation convention was, as in the case of Estonia and Finland, signed simultaneously with the pact.

Article 5 contains the provisions concerning the language and ratification of the pact. Article 6 provides for the pact a duration of three years from the time of the exchange of ratifications. Each of the contracting parties has the right to denounce the treaty on six months' notice. This period of ratification is, however, unnecessary in the event that one of the contracting parties attacks a third state. The duration of the pact is automatically extended for two years in case the denunciation provided for does not occur, or in case one of the contracting parties does not indicate its refusal to prolong the pact in the manner provided for.

A convention on conciliation procedure, provided for in Article 4, is annexed. The convention contains fourteen articles which regulate the competence, composition, place and time of meeting, session, principal objectives, order of business, and other questions concerning the competence of the conciliation commission. It need only be mentioned that Article 13 stipulates that it is to be considered an integral part of the pact, and that it therefore comes into force with the ratification of the latter.

Negotiations regarding the conclusion of a non-aggression agreement between Estonia and the Soviet Union took place at the same time as those with Latvia. The failure of Estonia to sign such an agreement with Soviet Russia is traceable to Estonia's political mistrust of Soviet Russia after the unsuccessful Bolshevik *putsch* in Tallinn of December 1, 1924. The political relations of both states were not propitious for a successful conclusion of the negotiations. Thus Estonian-Russian tension was naturally not without effect on the negotiations simultaneously in progress between Latvia and Soviet Russia, since Estonia and Latvia, by their treaty of defensive alliance of November 1, 1923,<sup>27</sup> obligated themselves to proceed in common in matters of foreign affairs. The signature of the Estonian pact did not take place until May 4, 1932, three months after the signature of the Latvian pact. The ratification likewise took place three months later, on August 5, 1932.<sup>28</sup>

The Estonian pact is almost identical in content with the Latvian pact. The preamble of both pacts is textually the same, with the exception of the reference in the preamble to the Estonian treaty as the fundamental basis of Estonian-Russian relations.

Article 1 of the Estonian pact, identic in content with the same article in the Latvian pact, also contains the mutual guarantee of the frontiers laid down in the Treaty of Tartu. Article 2 imposes on the contracting parties the same obligations with regard to neutrality as those in the Latvian pact.<sup>29</sup> The further articles (3, 4, 5, 6) of the Estonian pact agree in content with the same articles of the Latvian Pact.

To provide for the settlement of disputes, a conciliation convention, de-

<sup>27</sup> Art. 2 of the so-called "alliance."

<sup>28</sup> The pact is published in the official organ of Estonia, 62 *Riigi Teataja*.

<sup>29</sup> However, Art. 2 of the Estonian pact is stated in shorter form.

clared to be an integral part of the pact and to enter into force with its ratification, is annexed to the Estonian pact. This, although it only contains ten articles, is identic in content with the Latvian conciliation convention.<sup>30</sup>

Finland also delayed for a long time the non-aggression pact negotiations suggested simultaneously to all the Baltic States by the Soviet Union. Finland particularly insisted on its own standpoint in the matter of a court of arbitration. The conciliation procedure suggested by the U.S.S.R. appeared to Finland to be insufficient for the settlement of possible future disputes. Moreover, the neutrality clause contained in the pact appeared to the Finnish Government to be not so easily reconcilable with the Covenant of the League of Nations. Therefore the Finnish Government did not, from 1926 to 1932, change its negative attitude toward the non-aggression agreement, in spite of the fact that her neighbors, Latvia, Estonia and even Poland, were already inclined to bring the non-aggression negotiations to a satisfactory conclusion. The Finnish Government, which meanwhile was represented on the Council of the League of Nations, remained true to the League, and wanted to express its sincerity by specific acts—perhaps thereby to convince the world that it did not see the guarantee of its political independence and territorial integrity and security in the provisions of the pact with Soviet Russia, but regarded the League of Nations and the provisions of the Covenant as the basis of its political security and its defender in case of aggression.

After years of indecision, and in view of the uncertain political situation in Europe and the helplessness of the League in the solution of difficult political problems, especially those of the Far East, Finland finally signed the non-aggression pact with the Soviet Union in Helsingfors on January 21, 1932. The ratification took place on April 22 of the same year. To the pact was annexed, as in the case of the Latvian and Estonian pacts, a conciliation convention for the settlement of possible future disputes. The content of the pact, as well as that of the conciliation convention agrees by and large with the content of the Latvian and Estonian pacts, of which it was in fact the prototype.

The preamble, in contrast with the preambles of the Latvian and Estonian pacts, merely refers to the fact that the pact is intended to supplement and implement the Kellogg-Briand Pact.

Article 1 guarantees the inviolability of the boundaries laid down in the peace between Finland and Soviet Russia which remains the basis of their mutual relations. It further makes it incumbent upon the contracting parties to refrain from attacking each other. Its second paragraph further determines the definition of aggression, *i.e.*, every attempt to infringe the

<sup>30</sup> The remaining four articles of the Latvian conciliation convention contain several individual provisions of purely technical significance, *e.g.*, Arts. 2 and 3, regarding a question of quorum of the commission, etc.

inviolability and integrity of territory as well as the political independence of the contracting parties, regardless of whether this occurs without a declaration of war and even avoiding the usual procedure bound up with a declaration of war, will be considered as aggression.<sup>31</sup>

Article 2 contains the neutrality clause which, while agreeing in content with that used in the Latvian and Estonian pacts, in form more closely resembles the Lithuanian clause.

Article 3 imposes on the contracting parties the duty of not participating in any treaties, agreements or conventions, which are directed expressly against the other party, and which, either formally or in content, conflict with this treaty.

Article 4 of the Finnish pact agrees in content and text with Article 3 of the Latvian and Estonian pacts.

Article 5 provides for the creation of a conciliation commission for the purpose of settling potential disputes, regardless of their kind or origin, which may arise after the treaty goes into effect and which cannot be settled through ordinary diplomatic channels.

Articles 6, 7, 8 and 9 of the Finnish pact correspond in content to Articles 3, 4, 5, 6 of the Latvian and the Estonian pacts.

A supplementary provision, entirely lacking in the Latvian and Estonian pacts was entered in a protocol after the signature of this pact. By it both parties declare that the premature denunciation of this treaty cannot remove or limit in any way the obligations of the parties under the Kellogg-Briand Pact. The conciliation convention annexed to the pact, consisting of 11 articles, does not, in principle, differ as to content from the Latvian and Estonian conventions.

If one compares the four pacts, the following chief differences are apparent:

The first great difference consists in the fact that while the Lithuanian pact (Article 5) provides for the settlement of potential disputes by a conciliation commission whose composition, powers and procedure were to be determined in a convention still unconcluded, such a convention is annexed to the other three pacts, by virtue of an express stipulation declaring it an integral part of these pacts. This marked a victory for the standpoint of Latvia, Estonia and particularly Finland, which held that the conclusion of a non-aggression pact without providing a method for the settlement of differences of opinion and other conflicts, would be a fruitless effort. This standpoint of Lithuania's three Baltic neighbors is naturally based on the fact that, because of the "immediate adjacency to Soviet Russia, potential controversies are apt to occur more frequently than they would in the case of Lithuania which, owing to the occupation by Poland of her capital Vilna and the adjacent territory, has no common boundary with Russia." How-

<sup>31</sup> A protocol annexed to Art. 1 states that the provisions of the convention of June 1, 1932, concerning the measures to be taken for the preservation of the inviolability of the boundaries remain in full effect.

ever, despite the illusory character of the conciliation procedure due to the lack of a tribunal with powers of ultimate decision, one can hardly speak here of an outstanding defect in the Lithuanian Pact; the deficiency could be very easily remedied since Lithuania now has precedents before her in the conciliation conventions of Latvia, Estonia, and Finland with the Soviet Union.

The content of Article 2 of the Lithuanian pact should be mentioned as being genuinely different from the pacts of the other Baltic States; in it is contained the obligation of the contracting parties to respect reciprocally, under all circumstances, their sovereignty and territorial integrity. In the Latvian pact with the Soviet Union the sentence is entirely lacking, while the Estonian<sup>32</sup> and Finnish<sup>33</sup> pacts refer to the reciprocal guarantee of the boundaries laid down in the respective Peace Treaties. Since such a guarantee flows, in practice, from sovereignty and territorial integrity, there is in principle no difference in the content of this provision, save that the expression "under all circumstances," found in the Lithuanian pact, is not contained in those with Estonia and Finland. In default of an official interpretation, it is possible to attribute various meanings to the phrase.

The content of paragraph 1 of Article 3 of the Lithuanian pact corresponds to the similar Article 1 of the Latvian and Estonian pacts and Article 2 of the Finnish pact; the difference consists only in that the Lithuanian text lacks the provision contained in the latter three treaties, prohibiting measures of aggression against one of the contracting parties "without regard to whether such an attack or such measures occur with or without the participation of several States, with or without a declaration of war." This broader definition of aggression has naturally a significance and importance which only practice can reveal. At present, all of the Baltic States having adhered to the London Convention of July 3, 1933, defining aggression, this provision loses its major importance.

The neutrality clause<sup>34</sup> of the Lithuanian pact hardly differs in content from the neutrality clauses of the Latvian,<sup>35</sup> Estonian<sup>36</sup> and Finnish<sup>37</sup> pacts; only in the formulation is a difference apparent. The Lithuanian neutrality clause is similar to that of Finland, since both emphasize not only the duty of maintaining the neutrality of the one contracting party, in case of aggression against the other party, but also of refraining from participation in treaties directed against the other contracting party; whereas, the Latvian and the Estonian provisions with regard to this matter contain only the obligation not to participate in treaties aggressively directed against the co-contracting party. Since, however, the preservation of neutrality in case of attack by one or more third states against one of the contracting parties flows automatically from the content of the similar Article 1 of the

<sup>32</sup> Art. 1, paragraph 1.

<sup>34</sup> Art. 3, paragraph 2; and Art. 4.

<sup>35</sup> Art. 2.

<sup>33</sup> Art. 1, paragraph 1.

<sup>36</sup> Art. 2.

<sup>37</sup> Art. 3.

Latvian and Estonian pacts, it may be concluded that the same rights and duties arise from the neutrality clauses of the four pacts for all the contracting parties. The remaining provisions of the pacts contain nothing of primary significance. The provisions concerning the duration<sup>38</sup> and denunciation<sup>39</sup> of the pacts differ, particularly between the Lithuanian pact and the other pacts. Of great significance is the stipulation contained only in the Protocol of Signature of the Finnish pact, that the denunciation of the pact can have no repercussion on the obligations arising for both parties from the Kellogg Pact. This provision is noteworthy as a special precautionary clause which might well have been included in the other pacts.<sup>40</sup>

The conception of aggression laid down in the Lithuanian pact has already been discussed. In the Latvian, Estonian and Finnish pacts the definition of aggression is expressed as follows:

According to Articles 1 and 2 of the Latvian and Estonian pacts aggression, or treaties of aggression, may be said to exist:

(1) If aggressive acts against one of the contracting parties or forcible measures against the integrity or territorial inviolability or political independence of the contracting parties occur, without regard to whether such attacks or such measures occur with or without the participation of other states, with or without a declaration of war;<sup>41</sup>

(2) If political or military treaties<sup>42</sup> or agreements are concluded which are directed against the independence, territorial inviolability or political security of the contracting parties;

(3) If treaties, conventions, or arrangements are concluded for the purpose of imposing an economic or financial boycott on one of the contracting parties.

According to the Finnish pact,<sup>43</sup> every attempt to infringe the integrity and inviolability of territory, or political independence of the contracting parties must be considered as aggression, regardless of whether this occurs without a declaration of war or even by avoiding the manifestations of war. Treaties which are expressly directed in a sense inimical to the other con-

<sup>38</sup> The Lithuanian pact was to last for 5 years, while the other pacts provided for only a 3-year period. The period of notification for denouncing the treaties was, however, the same in the four pacts: six months.

<sup>39</sup> Automatic renewal in the event of no denunciation extended the Lithuanian-Russian pact only for one year, while in such contingencies the other three pacts were extended for two years.

<sup>40</sup> Latvia and Estonia also signed the Kellogg Pact, and therefore might, as a precaution, have had this clause included. Lithuania having already concluded a non-aggression pact with the Soviet Union, could not, of course, have foreseen in 1926 the Kellogg Pact of 1928.

<sup>41</sup> That is, an offensive treaty concluded against the other contracting party. A treaty of defense, as for instance the Latvian-Estonian treaty of alliance and defense of Nov. 1, 1923, would not fall into this category.

<sup>42</sup> The Estonian pact speaks in general of political agreements, while the Latvian pact also refers to military treaties.

<sup>43</sup> Art. 1, paragraph 2.

tracting party, and which formally or substantively conflict with the pact, are to be regarded as treaties of aggression.

On comparing these different definitions, the following conclusions appear: The definition of aggression laid down in the Latvian and Estonian pacts must be considered as perceptibly broader than that of the Lithuanian pact, since, according to their terms, aggression may take place even without a declaration of war,<sup>44</sup> and either with or without participation of other states in the aggression. The definition of the so-called "treaty of aggression" is virtually the same in all four pacts.<sup>45</sup> The definition of the case of aggression is now made uniform by the convention on the definition of the aggressor,<sup>46</sup> signed at London, July 3, 1933, by the representatives of the Soviet Union, Afghanistan, Estonia, Latvia, Persia, Poland, Rumania and Turkey. Finland adhered<sup>47</sup> to the convention July 22, 1933, and Lithuania put it into force—although of course only bilaterally—by her separate convention<sup>48</sup> of July 5, 1933, with Russia.

Under Article 2 of the Convention Defining Aggression "the aggressor in an international conflict, with due consideration to the agreements existing between the parties involved in the conflict, will be considered the state which will be the first to commit any of the following acts: (1) Declaration of war against another state; (2) Invasion by armed forces, even without a declaration of war, of the territory of another state; (3) An attack by armed land, naval, or air forces, even without a declaration of war, upon the territory, naval vessels or air craft of another state; (4) Naval blockade of the coasts or ports of another state; (5) Aid to armed bands formed on the territory of a state and invading the territory of another state; or refusal, despite demands on the part of the state subjected to attack, to take all possible measures on its own territory to deprive the said bands of any aid and protection."

For the purpose of supplementing and perfecting this definition, Article 3 and its annex declare that "No considerations of a political, military, economic, or any other nature can serve as an excuse or justification of aggression as specified in Article 2 (see appendix for example)."

The annex to Article 3 stipulates "that none of the circumstances mentioned below may be used to justify any act of aggression in the sense of Article 2 of the said convention: the internal position of any state, as for example, its political, economic or social structure; alleged shortcomings of its administration; disorder following upon strikes, revolutionary or counter-revolutionary movements, and civil war; the international conduct of any

<sup>44</sup> The definition of aggression in the Finnish pact contains a certain amplification of the content of aggression in that aggression may exist even where the manifestations of war have been avoided.

<sup>45</sup> There are certain minor variations as to form in the Latvian and Estonian pacts on the one hand, and the Lithuanian and Finnish pacts on the other.

<sup>46</sup> Hereinafter cited as the London Convention.

<sup>47</sup> This JOURNAL, Vol. 27 (1933), Supp., p. 195.

<sup>48</sup> *Ibid.*

state, as, for example, infringement or a threat of infringing the material or moral rights or interests of a foreign state or its citizens; rupture of diplomatic or economic relations; measures of economic or financial boycott; conflicts in the sphere of economic, financial or other obligations in connection with foreign governments; border incidents which do not fall under any of the cases of aggression indicated in Article 2."

This definition is not only significant for the interpretation of the aggression clause of the bilateral pacts with the U.S.S.R., as is indicated in the literature on the subject,<sup>49</sup> but, in my opinion, assumes obligatory force for the parties concerned. In signing her convention, Lithuania referred expressly to the pact of September 28, 1926; whereas, in signing the London Convention, Latvia, Estonia and Finland referred only to the Kellogg Pact. Nevertheless it follows from the clause contained in the preambles of their pacts with the Soviet Union, that the latter are to be considered as supplementary to the Kellogg Pact; that the definition of the aggressor *eo ipso* applies also to the non-aggression pact, and therefore has obligatory effect in the determination of the case of aggression.

The position of Lithuania, Latvia, Estonia and Finland as members of the League of Nations will, by means of the reservation clause contained in Article 2—"with due consideration to the agreements existing between the parties involved in the conflict"—become clearer in so far as sanctions (to which League members in pursuance of the Covenant may, in certain contingencies, have recourse against the states signatory to the non-aggression pacts) are not deemed to be unlawful acts of aggression. The definition in the London Convention is, by comparison with the interpretation of aggression in the Kellogg Pact, appreciably broader. For instance, while military occupation of foreign territory, short of war (so-called *occupatio pacifica*), is not forbidden in Article 1 of the Kellogg Pact, it is, undoubtedly, an unlawful act of aggression according to Article 2 of the London Convention. Under the Kellogg-Briand Pact, non-military means of coercion, such as reprisals, pacific blockade, embargo, are not expressly forbidden for the settlement of disputes, and therefore cannot be considered as characteristics of aggression. Article 3 of the London Convention, however, makes it absolutely clear that even such "peaceful" measures may be considered as unlawful acts of aggression. This broadened interpretation of the definition of the aggressor follows, moreover, from Politis' report, which formed the basis of the London Convention, and which, therefore, is to be considered as the final source of authority.

The question of the compatibility of the obligations arising under the neutrality clauses of the several pacts, with those of membership in the League of Nations, has already been answered in the affirmative. The chief difficulty in this connection, namely, the possible differences of opinion

<sup>49</sup> Dr. Friede, "Die Ostpakte über die Definition des Angreifers," *Zeitschrift für Östrecht*, Band VII, Heft 8/9, 722.

regarding the meaning of aggression, has now been removed by the London Convention. It might be objected that since the initiative for the conclusion of the convention came, not from the League of Nations as such, but from the Soviet Union, it is therefore to be regarded simply as a regional understanding. Nevertheless, it should be noted that the definition of the aggressor was taken from the *Politis* Report of May 24, 1933, and was approved by the preponderant majority<sup>50</sup> of the states participating in the Disarmament Conference. Moreover, through the precedents created at the instance of the Soviet Union, a large group of states, all now belonging to the League of Nations, have accepted as binding the definition of the aggressor stipulated in the convention, and thereby insured its operation within the framework of the League of Nations. Finally, since the London Convention provides for taking into consideration possible future divergent interpretations of aggression (according to either the London Convention or the Covenant of the League of Nations) it may be concluded that, with the signature of the London Convention the harmonization of the neutrality clauses of the non-aggression pacts with the provisions of the League Covenant can hardly present any difficulties, now or in future.

With the admission of the Soviet Union to the League of Nations on September 18, 1934, all the juridical difficulties arising out of the potential conflict of the pacts with the Covenant seem to have been avoided. In spite of the obligation incumbent upon members to procure release from anterior inconsistent obligations, the Sixth Commission, when examining the question of the admission of the Soviet Union, in no wise indicated any inconsistency between the Baltic pacts and the Covenant. It must therefore be supposed that the question of the compatibility of the obligations arising under the neutrality clauses of the pacts with those arising from membership in the League has been affirmatively settled. It would also appear that by the fact of the admission of the Soviet Union to the League, the definition of aggression under the London Convention will gain increasing acceptance on the part of the members of the League.

It is now permissible to examine the important problem of the neutralization of the Baltic states. By the stipulations of the Lithuanian, Estonian and Finnish treaties of peace with the Soviet Union, provision was made for the eventual neutralization of these states under an international guarantee. Further, in pursuance of Articles 13 and 14 of the Finnish treaty, the Finnish Islands in the Finnish Gulf, the Aaland Islands, and Lake Ladoga have already been recognized as neutralized.<sup>51</sup> These provisions, particularly those concerning the neutralization of the entire territory of the Baltic states, although they are of declaratory significance, are, notwithstanding,

<sup>50</sup> Of the Great Powers, only Italy has pronounced herself as against the aggressor formula of the *Politis* Report.

<sup>51</sup> The neutralization of the Aaland Islands was effected in reality by the Geneva Convention of Oct. 20, 1921.

capable of being implemented under certain political circumstances.<sup>52</sup> The coming into being of these political circumstances is, in my opinion, bound up to a certain extent with a just solution of the Vilna question,<sup>53</sup> which would doubtless contribute to the political stabilization of Eastern Europe, and prepare the way for the neutralization of the Baltic states area.

In the literature on the subject, the political prospects for effecting the neutralization of the Baltic<sup>54</sup> have been regarded optimistically<sup>55</sup> by many, and pessimistically by others.<sup>56</sup> The examination of the political problems of the Baltic states is beyond the scope of this study, which is confined merely to the juridical examination of the problems of Baltic security and neutrality. From an international law standpoint, however, the non-aggression pacts are to be regarded as an important factor in the event of neutralization of the Baltic states.

Their neutrality clauses, whose compatibility with the League Covenant and the London Convention has been demonstrated, are to be regarded, not only from the standpoint of abstract jurisprudence, but from that of concrete practice, as the cornerstones of future neutralization agreements, since the pledge to neutrality, even if only bilateral, is a constituent part of the complex of obligations of a neutralized state or group of states. The international legal prerequisites for the erection of the Baltic neutralization structure have now been fulfilled. The implementing of the idea of neutralization—a matter of vital importance and a *conditio sine qua non* of the peaceful development of the Baltic states—remains a political hostage of the future.

<sup>52</sup> Cf. in this connection my article in *Kardas*, Nos. 9, 10 (1933, in Lithuanian).

<sup>53</sup> Cf. my discussion, "*Litauen, Russland und das Wilnaproblem*," *op. cit.*, 16–22.

<sup>54</sup> Possibly by bringing the Scandinavian states (Denmark, Sweden, Norway) into the Baltic confederation also and effecting the neutralization of such a confederation.

<sup>55</sup> Cf. in this regard: Frauenstein, *Die Zentraleuropäischen Randstaaten mit besonderer Berücksichtigung des baltischen Dreibundproblems* (Riga, 1921). Also Rolnik, *Die baltischen Staaten. Litauen, Lettland und Estland und ihr Verfassungsrecht* (Leipzig, 1928).

<sup>56</sup> A particularly pessimistic appraisal of the prospects of neutralization of the Baltic states is given by W. Schroeder, *Russland und die Ostsee* (Riga, 1927), 255–259.

## CHINESE INTERSTATE INTERCOURSE BEFORE 700 B.C.

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The Chinese Empire conveniently dates from 221 B.C., when the King of Ch'in<sup>1</sup> coined the title which has since served for Emperor, and with considerable justness designated himself The First Emperor. Conqueror though he was, he left much still to be done in the process of consolidating under one imperial sovereignty all the kingdoms and tribes of the area which is now north and central China. During the pre-imperial era, intercourse among the rulers of the independent units naturally had a customary pattern, an Asiatic analogue to the rudimentary interstate law of the Greek city states. Two bloody centuries preceding The First Emperor have left much martial romance and philosophy both militant and pacifistic, but meager history. From a relatively quiet earlier period, 722-481, however, the classic annals transmit an abundance of critically acceptable history in palpable detail, with interstate incidents suitable for the purpose of case studies. This paper is limited to the first twenty years of that period, the earliest possible for its purpose, which is to induce interstate custom solely from episodes credibly recorded in Chinese classics. Only a few illustrative cases are quoted here, but all the generalizations rest wholly upon case studies unless specifically noted otherwise.

About three centuries earlier, *circa* 1050—chronology becomes inconsistent beyond 841—the Chou people from the northwest came into north China and took the richest lands. The orthodox Confucian school of later times has attributed to the early Chou a Golden Age of ideal empire, and labeled the whole period the Chou Dynasty, conventionally 1122-249. From this orthodox viewpoint the states of the middle and latter Chou period are rebellious vassals, fragments of a breaking empire, comparable to the states of Europe after Charlemagne. Western scholars generally make this a feudal period, although the political pattern of these early Chinese states differs sharply from European feudalism. The modern critical view tends rather to doubt that there had been a Chou empire to break to pieces.<sup>2</sup>

<sup>1</sup> For the history of Ch'in, see Albert Tschepe, *Histoire du Royaume de Ts'in*, 2nd ed., *Variétés Sinologiques*, No. 27 (Chang-hai, 1923). This and four other similar works by Tschepe, *Variétés Sinologiques*, Nos. 10, 22, 30, 31, give full political histories of the chief pre-imperial kingdoms. See also Henri Maspero, *La Chine Antique* (Paris, 1927); Marcel Granet, *La Civilisation Chinoise* (Paris, 1929); Richard Wilhelm, *Geschichte der Chinesischen Kultur* (Munich, 1928); trans. Joan Joshua, *A Short History of Chinese Civilization* (London and New York, 1929); and notes 6 and 7 below.

<sup>2</sup> For the general student of ancient Chinese history, a detailed study such as this paper suggests points of departure for extrapolating lines of development into the earlier myth-

A still earlier epoch, preceding the Chou conquest, has left fragments of its own writing, mainly oracular records inscribed on bone and tortoise shell, recently discovered at the site of a capital of the old Shang Kingdom.<sup>3</sup> These paleographic documents are difficult enough to understand, but at least they are clear of the legend and myth which confound the classic accounts, and so are throwing a flood of light upon the high bronze-age culture of the aristocracy of north China prior to the invasion of the cruder but more effective Chou people. Tentative identifications have been made of the paleographic names of many states and tribes,<sup>4</sup> and, as decipherment and interpretation proceed, data may develop for some inferences upon the interstate pattern of that epoch.

In the fully historical time at the close of the 8th century B.C., principalities and tribes thickly dotted the two large geographical areas, the northern loessic lands along the Yellow River, and the alluvial valley of the Yangtse River, now known not as southern but central China.<sup>5</sup> Traditionally the states of the northern group were the vanguard of civilization, the "Chinese federation"<sup>6</sup> or the "orthodox China"<sup>7</sup> in contradistinction to the barbarians and southerners. For the purposes of this paper, such traditional preferences are set aside. The two kings<sup>8</sup> and all the princes and chieftains are here treated as sovereign rulers in so far as their recorded possessions and actions consistently connote sovereign independence. The rulers were hereditary and absolute. Their states, so far as concerns diplomacy, were relatively small units of aristocracy, consisting of a large ruling family and its kindred nobility. The great majority of the population in the richer states was the serflike peasantry, ranking in the histories only a step above the royal herds. In all, some 200 states have been identified as existing *circa* 700 B.C.

The Chinese, of course, have studied the interstate aspect of their ancient history, but from a particular viewpoint. The orthodox views are set forth, sometimes at length, in various ritual classics<sup>9</sup> which magnify the ceremoni-

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crusted centuries. The actuality behind the traditional Chou Empire is a matter of utmost interest, yet to be studied in the light of modern criticism.

<sup>3</sup> W. P. Yetts, "The Shang-Yin Dynasty and the An-yang Finds" (*Journal of the Royal Asiatic Society*, 1933), 657-685. For bibliography, see George Bounakoff, *The Oracle Bones from Honan* (In Russian. Leningrad-Moscow, 1935).

<sup>4</sup> Hsü Hsieh-chen, *Yin Ch'i T'ung Shih* (6 vols., Peiping, 1933). However vulnerable in other points, this very unorthodox work, in Vol. 1, impressively documents names of tribes or states.

<sup>5</sup> Carl Whiting Bishop, "The Beginnings of North and South in China," *Pacific Affairs*, VII, 297-325 (New York, Sept., 1934).

<sup>6</sup> Friedrich Hirth, *The Ancient History of China* (New York, 1908).

<sup>7</sup> Edward Harper Parker, *Ancient China Simplified* (London, 1908).

<sup>8</sup> *Wang*=King. The King of Chou is consistently so titled in the texts; the King of Ch'u, irregularly. See note 19, *infra*.

<sup>9</sup> For instance, the *Chou Li*, orthodoxly regarded as a compendium of the institutes of the Chou Empire. W. A. P. Martin (see appended bibliography) regarded this work as the basis

als of interstate intercourse, and in the canonical philosophers who moralized over every ethical problem and awarded praise and blame to the ancient princes according to their conduct. The whole classic picture is suffused with the imperialism of the Han dynasties, 206 B.C. to 221 A.D., when, in course of reconstruction from ancient fragments, the texts naturally were shaped to the cosmopolitan Han idea of one empire embracing all civilized people. The scholars of the imperial court and archives extolled the triumphant imperialism of their own day and retrojected it into their rescensions of ancient history. The imperialistic prejudice is particularly conspicuous in speeches, as for instance in the *Shu Ching*, the Bible literally, commonly known in English as the Book of History. But these speeches can not be taken as stenographic, but rather as conscientious labors of text editors on behalf of worthy princes and ministers of old. A few bald chronicles of events which appear to derive from ancient state archives have been preserved within the mass of canonical lore, and these are the safest guides to the actualities of the early interstate custom.

Appended to this paper is a bibliography of the modern study of the subject in terms of international law. This begins with W. A. P. Martin, American Presbyterian missionary who became professor of international law and, from 1869, also president of the Imperial T'ung Wen College founded at Peking for training Chinese diplomatic personnel. In this connection Dr. Martin supervised translations from Wheaton, Woolsey, Bluntschli, and de Martens. In regard to the early Chinese interstate situation he, like others after him, accepted the conventional Golden Age of the early Chou, and regarded the states as "fragments of a disintegrated empire."

The classic annals here used are the *Ch'un Ch'iu* and *Tso Chuan*,<sup>10</sup> to be cited as CC and TC. One is a terse chronology covering 722-481 in the history of the state Lu, in the northern group; the other is a discursive compilation cut and arranged as an amplification. The combined text has been translated by Legge<sup>11</sup> and Couvreur,<sup>12</sup> to be cited as L and C. The excerpts here given are all translated afresh but in general follow the literal rendition

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of the interstate law of the *Ch'un Ch'iu* period.—Trans., Éd. Biot, *Le Tcheou Li ou Rites des Tcheou* (2 vols., Paris, 1851). There is an English translation of a Chinese abridgment, Wm. Raymond Gingell, *The Ceremonial Usages of the Chinese*, B.C. 1121 (London, 1852). For other ritual classics, see note 25, *infra*.

<sup>10</sup> Henri Maspero, *La Composition et la date du Tso tchouan*, *Mélanges Chinois et Bouddhiques*, No. 1 (Bruxelles, 1932), pp. 137-215. See also the contributions of Bernard Karlgren there cited.

<sup>11</sup> James Legge, *The Chinese Classics*, Vol. V (in two books, Hongkong, 1872). See note 12.

<sup>12</sup> S. Couvreur, *Tch'ouen Ts'iou et Tso Tchouan* (3 vols., Ho Kien Fou, 1914). Both Legge and Couvreur count A.D. as a zero year, and so date the years 722-703 as 721-702. The dates in this paper follow Mathias Tchang, *Synchronismes Chinois, Variétés Sinologiques*, No. 24 (Chang-hai, 1905, Chinese ed., 1904); also P. Hoang, *Concordance, Variétés Sinologiques*, No. 29 (Chang-hai, 1910).

of Legge rather than the Couvreur version which embodies the old orthodox interpretations and frequently interpolates. In reading the one word "prince" for the five ranks, *kung, hcu, po, tzu, nan*, the translation here follows Couvreur instead of Legge's "duke, marquis, earl, viscount, baron." Couvreur's edition is more convenient for citation, having less words per page, and the corresponding text, transliteration and translation all together on each page.

The text for the twenty years 722-703 contains the names of fifty-five bodies politic, in broadest sense, including organized barbarian tribes, town-states temporarily enjoying independence, and small states on verge of absorption into larger, together with forty-three principalities commonly considered states.<sup>13</sup>

Forty warlike operations are recorded, including attacks, *fa*, and invasions, *ch'in* and *ju*. Any injury, insult or pique could go for *casus belli*, and attack called for retaliation. Battles among the nobles of the richer states seem rather sporting combat, seldom sanguine. Only two casualties are recorded of the forty battles: a noble was killed by an arrow from one of his own comrades [C 57], and the King of Chou was wounded in a contest won by the Prince of Cheng<sup>14</sup> who sent condolences after battle [C 84]. The amenities of this animated chess, suggestive of the chivalry of medieval Europe, pertained to the aristocrats only, and did not extend to the serf foot-soldiers who fended for their chariot-riding masters.<sup>15</sup> Some rules of war can be inferred, especially in regard to intervention, but are omitted here, to proceed to customs corresponding to the law of peace.

### 1. CONFERENCES

Intercourse among states at peace had both ceremonial and practical aspects, and took place in conferences and court visits of princes and in diplomatic interchange. During the twenty years the text records fifteen *hui*, formal and pre-arranged meetings of two or three princes, with both practical and ceremonial character. A commentarial insert in the *Tso Chuan* describes these conferences as "special face-to-face meetings," *t'e hsiang hui* [C 73]. The *hui* were held in the open, generally by lakes or on hills at more or less sacred spots.<sup>16</sup> This outdoor element suggests an origin of the custom at an epoch of less confident interstate relations, when rulers dared not open their capitals or cities to other rulers accompanied by retinues. The nature of the

<sup>13</sup> For their locations, see John Chalmers's map in Legge, Vol. V (*supra*, note 11); also the new map in Tschepe, *Variétés Sinologiques*, No. 27, 2nd ed. (*supra*, note 1); or in any Chinese historical atlas.

<sup>14</sup> Prince Chuang, who reigned 743-701 over the state Cheng, was the leading personality of his time among the princes of the northern area.

<sup>15</sup> See Granet, *La Civilisation Chinoise*, p. 309 ff.

<sup>16</sup> See Granet, *Danses et Légendes de la Chine Antique* (Paris, 1926), pp. 145-149, 340-345, 349. See also pp. 171-213 for a conference and peace treaty between the states Lu and Ch'i, in 499, at Chia-Ku, with Confucius present.

business transacted at these fifteen conferences<sup>17</sup> is indicated in context, often explicitly stated: four conferences were to plan joint war, three to consult on defense or intervention, three to make peace, three to reaffirm friendly relations, and two to settle marriages between ruling families. There were also informal meetings of princes, *yü*,<sup>18</sup> which might serve for preliminary conversations. This case in 715 illustrates the distinction:

CC In the 8th year [of Prince Yin of Lu], the spring quarter, the Prince of Sung and the Prince of Wei met (*yü*) in Ch'ui.

TC In the 8th year, spring quarter, the Prince of Ch'i was about to reconcile the states Sung and Wei [with the state Cheng]. There was a time appointed for a conference (*hui*). The Prince of Sung made an invitation, with gifts, to the Prince of Wei, proposing to see each other in advance. The Prince of Wei agreed, and so they met (*yü*) at Ch'üan Ch'iu [lit., Dog Hill, a site at Ch'ui, in the state Wei]. [L 25, C 44.]

The sequel to this is under Mediation, and other *hui* cases appear in various connections to follow.

In later years the text records larger assemblies, some of which had the character rather of *durbars*, the convoking prince exercising a degree of hegemony. One such assembly was convoked in 704 by the King of Ch'u,<sup>19</sup> the greatest state in the central Yangtse valley:

TC The Prince [King] of Ch'u called together the princes<sup>20</sup> to meet at Shen-lu [in Ch'u]. The Prince of Huang and the Prince of Sui did not come to the conference. The Prince of Ch'u dispatched Wei Chang to reprimand the Prince of Huang. The Prince of Ch'u himself attacked Sui. [L 52, C 96.]

A century later the Kingdom of Ch'u was exercising a hegemony<sup>21</sup> over an area much greater than at this time.

## 2. COURT VISITS

Princes in friendly relations also visited one another. On these occasions, in contrast to the outdoor conferences, *hui*, the visiting prince went into the capital and the ceremonies were held in the temple and palace of the receiving

<sup>17</sup> Case tabulations omitted here because of space limits.

<sup>18</sup> *Yü* in the sense "to meet hurriedly or before fixed date (of rulers, etc.);" occurs five times in the *Tso Chuan*. Fraser & Lockhart, Index to the *Tso Chuan*, p. 376.

<sup>19</sup> The *Tso Chuan* here has him, first, a 4th-rank prince, *Tzu*, and then, C 97, as often elsewhere, king, *wang*.

<sup>20</sup> *Ho chu hou*: "the" princes can refer here only to princes of the central Yangtse River area. If the text had indicated how many princes were summoned, the implications would be clearer. As it is, the conference could be a device to lay a *casus belli* on Sui.

<sup>21</sup> The hegemonic princes were called *pa*, translated variously as hegemon, president, protector, constable of princes. The conventional Five Hegemonies begin with Prince Huan, who reigned 685-643 in the state Ch'i; but there may have been similar hegemonies before.

prince. The visits are recorded with the word *ch'ao*, literally "court," and as a verb "to make a court visit." Eleven court visits are recorded of the twenty-year period. Eight were made to the court of Lu, a natural majority since the text is in the form of the history of Lu. The other three were to the Kingdom of Chou.

There is one exception to the custom that these visits were made by ruling princes, in the case of a visit in 703 made to the Lu court by the heir of the ruling house of Ts'ao. At that time the Prince of Ts'ao, who died a few months later, was quite aged, having reigned fifty-four years, and so presumably was physically unable to make the state visit himself. The deputized visit is recorded as *ch'ao*, but the text says that the heir was accorded only the honors due to a high minister [C 100-101].

In most cases nothing is recorded or implied in the way of practical business in connection with these court visits, and they appear rather to have been highly ceremonial functions affirming good relations. Courtesy was paramount, and any discourtesy was taken gravely. Thus in 710:

TC In the autumn quarter, 7th month, the Prince of \*Ch'i<sup>22</sup> came on a court visit [to Lu]. He was not respectful. The moment the Prince of \*Ch'i left, the Prince of Lu discussed making an attack upon him. [L 40, C 72.]

The King of Chou was discourteous to the Prince of Cheng on the occasion of this prince's first court visit to Chou, in 717 [C 39-40]. The nobility of the state Ch'i mediated to bring about a second visit in 715:

TC In the 8th month on the 23rd cyclic day, the Prince of Cheng, through [the good offices of] nobles of the state Ch'i, made a court visit to the King of Chou. [C 46.]

But this did not mend the general break between Cheng and Chou. In their subsequent hostilities the text gives for *casus belli* the fact that the Prince of Cheng ceased court visits to Chou [C 32], rather implying a notion that court visits were requisite to a status of good relations, at least among the élite states of the northern plain.

The chief of the Jung, who are conventionally accounted barbarians, was visitor to the court of Chou in 716 [C 42]. The text gives the chief no title but records his visit by *ch'ao* as in the other cases. The king seems to have observed due courtesy on this occasion, but one of his ministers did not, and the Jung later took vengeance upon the minister by attacking and taking him captive as he journeyed by their territory [C 42-43].

A dispute over precedence is recorded in 712, when the princes of T'eng and Hsieh came simultaneously to the court of Lu [L 32, C 54-56]. The

<sup>22</sup> \*Ch'i, \*Wei and \*Chou are asterisked to distinguish them from the larger states Ch'i and Wei and the Kingdom Chou, homophonous but entirely different Chinese written characters.

Prince of Lu took the matter in hand and ruled in favor of T'eng on the ground of clan kinship.<sup>23</sup>

The ceremonial distinction of the court visits appears in contrast with other visits of princes recorded without the word *ch'ao*. The *Tso Chuan* uses the verb *lai*, "to come," in recording the attendance of the Prince of Wei at the second burial<sup>24</sup> of the late prince of Lu, in 722 [L 7, C 12]; also in recording the coming of a Prince (*po*) of Chai [L 7, C 13]; and again in 704, in recording the arrival of a Prince (*kung*) of Chai who stopped at the Lu capital while en route to another state on a betrothal mission for the King of Chou [L 52, C 98].

### 3. MISSIONS

Deputized communication was more frequent than personal contact of princes, and princes' representatives were sent on missions both of ceremony and of practical interstate business. The word *p'ing*<sup>25</sup> denotes a distinct category of courtesy missions. Seven *p'ing* cases are recorded, all within the years 716-704 and all to the court of Lu. Two came from the great state Ch'i, one of these following directly after the marriage of a lady of the house of Ch'i to the Prince of Lu [C 79]. The other five courtesy missions came from the Kingdom of Chou. The text records no return *p'ing* courtesies from Lu to Ch'i or to Chou.<sup>26</sup> The following, in 714, is typical of the *Ch'un Ch'iu* entries of the courtesy missions from Chou to Lu:

CC In the 9th year, spring quarter, the Celestial King (*T'ien Wang*) dispatched Nan Chi to come [to Lu] on a courtesy mission (*p'ing*). [L 27, C 48.]

<sup>23</sup> Clan connections cut across the state connections, and the clan links intrude constantly into interstate relations. No analysis of this aspect is attempted here. There were at least 57 states whose ruling families had the same clan name, *Chi*, as that of the Kingdom of Chou, and this is probably the key to the problem of the Chou paramountcy in the northern area. There were at least nine ruling houses of the clan name *Ying*, five each of the names *Chiang* and *Yen*, four each of *Feng* and *Ssu*, and so on.

<sup>24</sup> On the proprieties of funeral attendance, see also Legge, 564, par. 5.

<sup>25</sup> The ritual classic *I Li* has a section *P'ing Li*, giving a fantastically minute description of the ceremonial of receiving an envoy on a *p'ing*, courtesy mission. Trans., John Steele, *The I Li or Book of Etiquette and Ceremonial* (2 vols., London, 1917), pp. 189-242. The succeeding section deals with the banquet for the envoy. Another ritual classic, the *Li Chi*, has a section on *P'ing I*, a briefer and somewhat more practical treatment of the same general matter. Trans., James Legge, Vols. 27-28 of *Sacred Books of the East* (London, 1885). Trans., S. Couvreur, *Li Ki, Mémoires sur les Bienéances* (Sienhsien, 1899, 2nd ed., 1916).

<sup>26</sup> But this silence of the text does not prove that Lu sent no courtesy missions to Chou. Similarly, the text records no *ch'ao*, court visits, from Lu to Chou at this time. Chou participated in none of the recorded treaties of the period; but was somewhat prominent in intervention cases, not included in this paper. A distinction uniquely appertaining to Chou in all the texts is the king's special title *T'ien Tzu*, Son of Heaven. There is no doubt of a ceremonial, quasi-religious primacy of the house of Chou among the northern states. See notes 8, 23.

The custom of courtesy missions seems to have existed in the Yangtse area as well as in the northern area. The text has *p'ing* in connection with an interrupted mission to the state Teng, to be quoted in the next section on Envoys.

Diplomatic missions for purposes of practical interstate business were more frequent than the special courtesy missions, and occurred in both the northern and the Yangtse river areas. In addition to explicitly recorded cases, there are other diplomatic contacts implicit in the text in connection with other matters. Thus, the fact that conferences of princes were pre-arranged implies a dispatch of envoys to make the appointment. The text often records requests, *ch'ing*, from one prince to another without mentioning the envoy who must have been dispatched with the request, and, less often, communications of information. In absence of good evidence of written correspondence<sup>27</sup> among princes at this time, the assumption is that every interstate communication involved the dispatch of an envoy or at least a diplomatic messenger. There were no resident legations.

The text gives in more or less detail seventeen diplomatic missions, other than the *p'ing* cases, during the twenty years. Five of these were for the purpose of seeking military aid: Chu to Lu in 722 [C 12], the Wei usurper to Sung in 719 [C 25], Sung to Lu in 719 [C 27] and again in 718 [C 35-36], and Ch'i to Cheng in 706 [C 90]. The purposes of the other twelve missions were various: to present funeral gifts, Chou to Lu in 722 [C 10]; to request the arrest of a usurper and his accomplice, in effect asking foreign aid in a domestic trouble, Wei to Ch'en in 719 [C 28, and see next section on Envoys]; to report to a friendly prince the conclusion of a peace, and, in return, to convey compliments, Ch'i and Lu in 715 [C 47]; to request mediation, and, in return, to mediate as requested, Pa and Ch'u in 703 [C 99, case quoted in next section on Envoys].

In recording the dispatch of messengers under warlike conditions the text uses the same phraseology as in recording the peacetime diplomacy. The following exchange between hostile camps, in 706, occurred in an unsuccessful aggression by the King of Ch'u in 706, two years before his durbar-like convocation, already given under Conferences.

TC King Wu of Ch'u invaded the state Sui, and sent Wei Chang to ask for a settlement. His army was at Hsia [in Sui territory]. The nobility of Sui sent Shao Shih to negotiate the settlement. [L 48, C 85-86.]

Similarly, after the battle in 707 in which the King of Chou suffered an arrow wound in the shoulder:

TC In the evening the Prince of Cheng sent Chai Tsu to pay respects to the King and to make friendly inquiries of those about him. [C 84.]

<sup>27</sup> C 35 inserts "une lettre d'information" but there is nothing in the text to indicate a letter. L 19-20 is closer to the text.

The following case of severance of diplomatic relations, in 718, rather suggests that interchange was so frequent between some states as to amount to constant communication virtually serving the purposes of resident embassies:

TC The nobility of the state Sung sent an envoy to come [to Lu] to report and request [aid in resisting a siege]. The Prince of Lu had heard [through other channels]<sup>28</sup> of the enemies' invasion of the suburban area [of the Sung capital], and was on the point of sending assistance. He inquired of the envoy, saying, "How far has the army reached?" The reply was, "It has not reached the capital." The Prince of Lu was incensed, and stopped [his intended assistance]. He made excuses to the envoy, saying, "Your Prince wishes me to share in his anxiety over the peril of the altars to the gods of his land and grain [the palladia of ruling house and state]. Just now I have asked, and the envoy has replied, 'The army has not reached the capital.' This is not a cause which I dare heed." [L 19, C 35-36.]

[In 714] . . . The Prince of Sung, because of the matter incidental to the invasion of his suburban area [as above], was angry towards the Prince of Lu, and did not send any message [of another attack]. The Prince of Lu was incensed, and ceased to send envoys to Sung. [L 28, C 49.]

Notwithstanding his former close relations with the prince of Sung and the fact that the two houses were intermarried,<sup>29</sup> the Prince of Lu then joined the princes of Cheng and Ch'i in war against Sung.

#### 4. ENVOYS

In recording the courtesy missions both the *Ch'un Ch'iu* and the *Tso Chuan* generally give the names of the envoys but seldom their rank, title or regular office at the court. In the two *p'ing* cases from Ch'i to Lu the envoy was a younger brother of the Prince of Ch'i. In ten of the seventeen missions of more practical than ceremonial character the text also furnishes the envoys' names. The noun "envoy" is formed from the verb *shih*, "to cause," "to send," and an enclitic: *shih-che* = "the one who is sent."<sup>30</sup> It occurs thrice in the passage last quoted. There is another term, *hsing jen*, literally "travelling noble," which appears obviously to derive from the journeying of diplomats but which seems no longer, at this period, to mean simply "envoy" but rather a manager of interstate communication, a min-

<sup>28</sup> C 35 inserts "une lettre d'information" but there is nothing in the text to indicate a letter. L 19-20 is closer to the text.

<sup>29</sup> The second princess of the late Prince of Lu, now dowager mother, was daughter of the Prince of Sung.

<sup>30</sup> Under the Empire, envoys to the Chinese imperial court were regarded as tribute-bearers, *kung-shih*, and the word *shih* alone came to savor so strongly of tribute-bearing that, in the 19th century, the Western Powers would not accept it to designate their resident ministers at Peking, and instead, stipulated by treaty the term *ch'in ch'ai*, imperial commissioner. [See letter of Lamiot, and annotations of Pelliot and Pritchard, *T'oung Pao* 31 (1934), 52.] The word *shih* occurs in almost all the various modern Chinese polysyllabic terms for ambassador, minister plenipotentiary, etc.

ister of foreign affairs, so to speak.<sup>31</sup> This function in later times appears to pass from father to son, though hardly in the full hereditary sense. The post is not one of the six ministries in the orthodox accounts of the ancient government.

Gifts were customary in diplomatic procedure, on practical as well as ceremonial missions. The *I Li* description of the reception of a courtesy envoy gives amazing minutiae of the formalities of offering and declining gifts.<sup>32</sup> The Prince of Sung asking the Prince of Wei for a preliminary interview sent gifts, *pi*, literally "silk." [Case quoted under Conferences.] Jade objects were probably also used, and perhaps bronze vessels, such as delight the archeologists and connoisseurs of ancient Chinese art. The gifts must have been of great value. In one episode in the upper Yangtse area in 703, diplomatic gifts figured in highway robbery and murder:

TC The Prince of the state Pa sent Han Fu [his *hsing-jen*] to report to the Prince [King] of Ch'u and to request him to intercede with the state Teng to bring about good relations. The Prince of Ch'u dispatched Tao So to accompany the guest from Pa [*i.e.* Han Fu] on a courtesy mission (*p'ing*) to the state Teng. Nobles of Yu, a southern town of Teng [or, possibly, a state bordering Teng] assaulted them in order to steal their gifts (*pi*), and killed Tao So and the *hsing-jen* of Pa [*i.e.* Han Fu]. The Prince of Ch'u dispatched Wei Chang to reprimand the state Teng. The nobility of Teng did not receive [the envoy; or, did not accept the blame]. In the summer quarter the Prince of Ch'u sent Tou Lien in command of an army, to join the army of Pa in laying siege to Yu. Yang and Tan, nephews of the Prince of Teng, led an army to help Yu. . . . [L 53, C 99-100.]

In regard to the question of diplomatic immunity, or more specifically the principle of safe passage, the tradition is that the persons of envoys were customarily held to be inviolate during the *Ch'un Ch'iu* period.<sup>33</sup> The foregoing case indicates at least that murder of envoys was a grave affront. There is one other instance of violence to an envoy mentioned in the text of the twenty years. This was the capture, in 716, by the Jung, of the Prince of the small state Fan, who was also, after a common custom of the time, minister at the court of Chou, where he had shown discourtesy on the occasion of the court visit of the Jung chief, already mentioned. When attacked by the Jung, this prince-minister was travelling as a Chou envoy, returning

<sup>31</sup> The *Chou Li* (*supra*, note 9) enumerates duties of both a senior and a junior, *ta hsing-jen*, *hsiao hsing-jen*. The *hsing-jen* par excellence of the *Ch'un Ch'iu* period was Tzu Ch'an (Kung-sun Ch'iao), 582-522, long the chief minister of the state Cheng. See E. R. Eichler, "The Life of Tsze-Ch'an," *China Review*, XV, 12-23, 65-78 (Hongkong, 1886).

<sup>32</sup> *Supra*, note 25.

<sup>33</sup> See, *e.g.*, in The Diary of His Excellency Ching Shan, published and translated by J. J. L. Duyvendak (Leiden, 1925), references to *Ch'un Ch'iu* customs as precedent against violence to envoys, made in appeals to the Empress Dowager by her counsellors who opposed the Boxer siege of the legations at Peking, 1900.

from a mission to Lu [L 22, 23, C 42]. Both the *Ch'un Ch'iu* and *Tso Chuan* record this act of vengeance, rather intimating a conspicuous violation of custom.

Probably diplomatic immunity was an element of the general custom of the time, but perhaps indistinguishable as a separate principle, being submerged instead in a larger principle of extraterritoriality applying to all the nobility. This is only a suggestion, and can not be developed here, beyond mentioning one pertinent episode in 719, an involved affair culminating in extraterritorial execution. A usurper and his accomplice, natives of the state Wei, were executed in the state Ch'en by officers sent from Wei to Ch'en for this specific purpose [L 15-17, C 22-26]. The Prince of Ch'en had arrested the pair on request from Wei, and then asked Wei to adjudicate. The extraterritorial element was therefore voluntary. Clan custom probably had a bearing in the case.<sup>34</sup> The houses of Ch'en and Wei belonged to different clans, *Kuei* and *Chi*, and the usurper was a member of the Wei ruling family, so that his death at Ch'en hands would have caused a blood feud, whereas his death in Ch'en territory at Wei hands was harmless. The Prince of Ch'en was not asked to do more than arrest the pair, and the passage reads as though the extraterritorial element accorded with usage, but leaves the question whether this element derived from state or clan custom.

Summarizing the forms of interstate intercourse: princes in friendly relations met one another in conferences which were ceremonial but also served for transaction of interstate affairs; they made court visits which were primarily ceremonial goodwill functions; and they frequently communicated by envoy, sending their diplomats on various practical errands and on courtesy missions which were diplomatic analogues to the ceremonial court visits. The text records such interstate communication during the closing years of the 8th century B.C., without the least intimation of novelty. The inference is that these customary forms were already well established before the commencement of the record at 722 B.C.

## 5. TREATIES

The ceremony usually employed to solemnize interstate agreements was called *meng*, here translated "covenant," as in Legge, rather than "traité," as in Couvreur. The *meng* ceremony by no means appertained only to interstate agreements. It was a blood oath used among the aristocracy generally to pledge friendship and good faith. As between princes, the *meng* ceremony, alone, had the effect of a covenant of amity or alliance. When specific matters were agreed upon, these constituted terms of a treaty, and the *meng* was the appropriate ceremony to bind the treaty. The oath ritual in treaty cases began with the reading aloud of the agreed terms, in the presence of the parties. The document—written on wooden planchette or bamboo slips—was bound to the sacrificial animal, an ox on important occasions.

<sup>34</sup> *Supra*, note 23.

The presiding prince held the ox's left ear, the ear was cut off, and blood was touched to the lips of the covenantors. Probably the presiding prince put the bleeding ear to the lips of the other covenantors as well as to his own.<sup>35</sup> The animal was buried with the treaty text attached to notify the gods of the land. An imprecation laid a sanction against violation of the covenant.<sup>36</sup>

There is an instance in 709 of an agreement between princes concluded without the oath ritual:

TC In the summer quarter, the Prince of Ch'i and the Prince of Wei made reciprocal declarations at P'u [in Wei]. They did not perform the *meng* ceremony. [L 42, C 77.]

The word *ming*, here translated "declaration," and in Legge "charge," conventionally is taken to signify an imperial or royal mandate. In the *Tso Chuan* it serves for any utterance of command, wish or information, made by a ruling prince. The context here indicates something more than mere exchange of information, and the omission of the covenant ceremony is extraordinary.

There are sixteen *meng* ceremonies recorded of the twenty years, mostly in conclusion of agreements the nature of which is indicated in the text. Nine were in the nature of peace treaties, four were treaties of amity, two were military pacts, and one was a ratification of an exchange of territory. Two of the amity cases were renewals of previous covenants, and there was also an intended renewal between the states Lu and Sung in 719 [L 16, C 25]. All the treaties were bipartite except three, which were tripartite.<sup>37</sup>

Counting the Jung tribe as a state, twelve states appear as treaty parties, located in both the northern and the Yangtse areas. The Kingdom of Chou is conspicuously absent.<sup>38</sup> In fifteen cases, at least one prince participated in the covenanting, and in the remaining case, in 722, the text leaves a question by mentioning "nobles," *jen* [C 13], who might be princes or ministers. In seven bipartite cases and two tripartite, all the covenantors were

<sup>35</sup> Suggestion of J. J. L. Duyvençak. Acknowledgment is gratefully made to him and to C. W. Bishop, S. H. Chi (Ch'i Ssu-ho), K. Asakawa, Clyde Eagleton, and Senator E. D. Thomas, for reading this paper in draft and for corrections and suggestions.

<sup>36</sup> For a broad and vigorous imprecation, see the oath in connection with a treaty to which 12 states were parties, in 562, L 453, C II, 271-272. The *Chou Li* (note 9, *supra*) lists a functionary *Chu-chu* specifically having to do with the covenant oaths or imprecations; trans. Biot, II, 101.

<sup>37</sup> In 701 there was a treaty with four party states, C 108. But all these recorded late 8th-century treaties are small affairs in contrast with the treaties incidental to the spectacular congresses and alliances of later centuries (*e.g.*, as in note 36). The great peace treaty made in Sung in 546 followed a conference of 14 states, though not all joined in the covenant; L 532-535, C II, 483 ff. This treaty has been described as an ancient precedent of the League of Nations: G. G. Warren, "The First League of Nations," *New China Review*, I, 356-367 (Hongkong, August, 1919); Evan Morgan, "A League of Nations in Ancient China," Ch. 18 in *A New Mind and other Essays* (Shanghai, 1930). The story is in L proleg. 120-122, and in Tschepe (note 1, *supra*) *Variétés Sinologiques*, No. 22, p. 170 ff.

<sup>38</sup> *Supra*, note 26.

princes. In an exceptional instance of duplicate convenanting, to confirm a peace between Ch'en and Cheng in 716, a minister of Ch'en went to negotiate and covenant with the Prince of Cheng, and nine days later an envoy of Cheng went and repeated the procedure with the Prince of Ch'en [L 23-24, C 43]. In three other cases, the text also indicates that one contracting state was represented by a minister or officer.

The first entry in the *Ch'un Ch'iu* is a covenant of amity between Lu and the small state Chu, in 722:

CC In the 3rd month the Prince [of Lu] and I-fu [head of Chu] covenanted at Mieh in Lu territory.

TC . . . The Prince was taking charge of the state, and so wished to seek good relations with the state Chu, and therefore made the covenant of Mieh. [L 5, C 3.]

This Prince of Lu in his first year also made a peace treaty with Sung, after which diplomatic relations were resumed:

TC The late Prince Hui in his last year [723] defeated the army of the state Sung at Huang. The present prince, being established, sought to bring about good relations, and so in the 9th month [in 722] covenanted with a noble [*jen*, the prince?] of Sung in Su. Thus was intercourse resumed. [L 7, C 11.]

In four instances the contracting princes met in conferences (*hui*) directly preceding the oath ceremonial. Customarily in such cases the *meng* ceremony was consummated at a different spot near the outdoor site of the *hui*. Certain sites appear to have been repeatedly used for such purpose. Chinese scholars generally link the two functions, and the Chinese historical atlases make a single category of covenant and conference sites, *meng hui ti*. The two sites are recorded by name in the case of this tripartite special military alliance, in 713:

TC The Prince of Lu met in conference with the Prince of Ch'i and the Prince of Cheng at Center Hill (Chung Ch'iu). On the 50th cyclic day they covenanted at Teng, appointing a time for mobilization [against the state Sung]. [L 29, C 51.]

The following is a sequence of conference, peace treaty, and courtesy mission:

CC In the summer quarter, 5th month, on the 58th cyclic day [in 717], the Prince [of Lu] met in conference with the Prince of Ch'i. They covenanted at Ai [in Lu].

TC In the summer quarter, they covenanted at Ai. Peace was resumed with the state Ch'i. [L 21, C 37.]

. . . [In 716] . . . The Prince of Ch'i sent I-chung Nien [his younger brother] to come [to Lu] on a courtesy mission (*p'ing*). This was to knot (*chieh*) the covenant of Ai. [L 22-23, C 41.]

The Prince of Lu seems to have been reluctant in covenanting with his neighbor, the chief of the Jung tribe, in 721:

- CC & TC In his 2nd year, the spring quarter, the Prince [of Lu] met in conference with the chief of the Jung, at Ch'ien [in Lu].
- TC This was to reaffirm the good relations maintained by the late Prince Hui. The Jung requested a covenant, but the Prince made excuses. . . .
- CC In the autumn, the 8th month [?], on the 17th cyclic day, the Prince [of Lu] and the chief of the Jung covenanted at T'ang [in Lu].
- TC The Jung had requested a covenant, and in the autumn quarter the covenant was made at T'ang, further to reaffirm good relations with the Jung. [L 8, 9, C 13-14.]

The next prince of Lu in his second year, 710, also covenanted with the Jung, and at the same site T'ang, to reaffirm the old amity [C 73]. The following is an instance of renewal, *hsün* [see L 829], continuing a covenant made before 722 and not recorded in the text except in this reference, in 720:

- CC In the winter quarter, the 12th month, the Prince of Ch'i and the Prince of Cheng covenanted at the Rock Pass (Shih Men).
- TC In the winter quarter, Ch'i and Cheng covenanted at the Rock Pass, to renew the covenant of Lu [both sites in Ch'i]. [L 12, 13, C 21.]

#### 6. TRANSFER OF TERRITORY

Territory was commonly taken by force. Seizures<sup>39</sup> of towns, farmlands and pasture lands are recorded as a matter of course in the text. There are two instances of peaceful transfer recorded of the twenty years, one a simple exchange, and the other, part purchase. The simple exchange was made between the King of Chou and the state Cheng in 712. Chou received four units of farmland, and Cheng received 12 units, which had appertained to a rebellious minister in Chou [L 33, C 61]. The sixteen units are listed in the text and presumably were agricultural townships characteristic of the time, each a small valley, or other more or less natural unit of farm or pasturage ground, including a village of serfs who went with the land in exchange.

The element of purchase figured in an exchange of detached pieces of land belonging to the states Lu and Cheng. Payment in gems compensated for presumably unequal values, and the transfer was solemnized by covenant four years after it had been begun in 715. Both pieces appear from their names to have been agricultural townships, but both also had a special ritual or religious aspect. The Peng Fields were at the foot of the sacred Mount

<sup>39</sup> Following are instances of forcible transfer: In 722, Wei took Lin-yen from Cheng, for the son of the would-be usurper, who took refuge in Wei, C 12; in 719 Chü took Mou-lou from \*Ch'i, C 24; in 718, Sung had seized fields from Chu, C 35; in 717 Sung took Ch'ang-Ko from Cheng, C 39; in 713 Lu got two towns taken by Cheng from Sung. Possibly Sung previously had taken them from Lu, L 7; in 713 Cheng took the petty state Tai, attacked by Sung, Wei and Ts'ai, C 53-54; in 712 Cheng established a partial and limited protectorate in the state Hsü, after attacking its prince in a joint expedition with Ch'i and Lu. Ch'i wished Lu to take the state, but Lu declined, C 56-60.

T'ai, and were near to Lu but belonged to Cheng. The Hsü Fields were near to the state Cheng but belonged to Lu and contained an altar to the venerated founder of the house of Lu. In 715:

CC In the 3rd month, the Prince of Cheng dispatched Yüan to come [to Lu] to cede Peng. On the 27th cyclic day he entered Peng.

TC The Prince of Cheng had proposed to discontinue his sacrifices at Mount T'ai and to perform the sacrifices [instead] to Chou Kung [the founder of Lu], in order to exchange the Mount T'ai place Peng for the Hsü Fields. In the 3rd month, the Prince of Cheng dispatched Yüan to come to cede Peng. He no longer sacrificed at Mount T'ai. [L 25, C 44-45.]

CC [In 711] In his first year, the spring quarter, in the first royal month, the [new] Prince [of Lu] formally succeeded. In his 3rd month, the Prince met in conference with the Prince of Cheng, at Ch'ui. The Prince of Cheng with gems obtained (*chia*)<sup>40</sup> the Hsü Fields.

TC In his first year, the spring quarter, the prince formally succeeded. He cultivated good relations with the state Cheng. The nobility [prince ?] of Cheng again proposed to perform the sacrifices to Chou Kung and to complete the exchange of the Peng Fields. The Prince [of Lu] agreed. In the 3rd month, the Prince of Cheng with gems obtained the Hsü Fields. This was because of the sacrifices to Chou Kung.

In the summer quarter, the 4th month, the 44th cyclic day, the Prince [of Lu] and the Prince of Cheng covenanted at Yüeh. This was to bind the settlement regarding Peng. The covenant said: "He who breaks this covenant shall not enjoy his state." [L 35, 36, C 65-66.]

This declaration would seem to be an imprecation<sup>41</sup> appropriate to a territorial transaction, acknowledging in effect that the covenantor who broke the pact should lose his lands, lay his state open to forfeiture or spoliation.

## 7. ASYLUM

Nobles in flight from their own states customarily were received and harbored by the nobility of other states. Such asylum was open to rebels and legitimate princes alike, but to aristocrats only, not to serfs. The notion of asylum is implicit in the verb *pen*, commonly translated "to flee," but in the annals of this time meaning rather "to take refuge." It links with the place fled to, rather than the place fled from, and the name of the state of refuge directly follows it; and another verb, *ch'u*, "to go out," often precedes it in the text, giving the sense "to flee from" and leaving *pen* only the sense here in point.

Five *pen* cases are recorded of the twenty years. In 722 the ambitious brother of the Prince of Cheng, unsuccessful in a scheme to usurp the state,

<sup>40</sup> The verb *chia*, "to borrow," often is used, somewhat euphemistically, for "to buy" or "to take." The transaction here must have been part purchase, part exchange.

<sup>41</sup> *Supra*, note 36.

"fled and took refuge in the state Kung," *ch'u pen Kung* [L 6, C 7]. The name of the state Kung in time became attached to this refugee, as though he belonged to it [C 4]. His son fled and took refuge in another state, Wei, and:

TC The nobility of the state Wei on his behalf attacked the state Cheng and took Lin-yen.<sup>42</sup> The nobility of Cheng, with an army of the King [of Chou] and an army of the state Kuo, attacked the southern borders of Wei; and also requested an army from the state Chu. [L 7, C 12.]

The seizure of Lin-yen goes for an act on behalf of the refugee rebel,<sup>43</sup> but such an aggression exceeds the general pattern of asylum, and must have had other causes, as suggested by the large retaliation recorded against the state Wei, in contrast to none recorded against the state Kung where the chief traitor took refuge.

The state Cheng was host to a future prince of the state Sung for ten years, 719-709, while his cousin ruled. The exile, although set aside by his father,<sup>44</sup> seems to have been preferred in Sung, and was promptly called back to become prince when the cousin was assassinated [C 68-69]. In 719:

TC When Prince Shang [nephew of the late Prince] formally succeeded in the state Sung, Ping the son of the late prince, fled and took refuge in the state Cheng. The nobility of Cheng gladly received him. [L 16, C 25.]

The presence of the exile in Cheng seems to have been used by an enemy of Cheng in inducing Prince Shang to join a coalition against Cheng. Armies of four states laid siege for five days at the East Gate of the Cheng capital, an affront which began a long train of retaliation ending in a mediation, to be quoted. The context gives the impression that the enemy, the Wei usurper who was extraterritorially executed, was abusing the customary proprieties of asylum.

During these years the ruling house of Chin was split into hostile camps, and the losing faction had much need of asylum. The head of the failing legitimate line, who is conventionally listed as the Prince of Chin at this time, was in retreat in the small state \*Sui<sup>45</sup> [L 21, C 37]. His son, the Prince of I—I was the seat of the losing faction—was attacked by the rival leader and his allies in 718, and took refuge in the same state \*Sui [L 19, C 32]. In the next year, together with a following of loyal kinsmen, they moved to the city O in Chin territory, whence the head of the failing line came to be known in Chin as Prince of O instead of Prince of Chin.

The Prince of the state Hsü, attacked and driven from his state by the

<sup>42</sup> *Supra*, note 39.

<sup>43</sup> *Ibid.*

<sup>44</sup> The *Tso Chuan*, L, 18, C 20-21, giving Prince Mu's reasons for designating his nephew instead of his son to succeed him, says that Prince Mu "caused his son to leave Sung and dwell in Cheng."

<sup>45</sup> *Supra*, note 22.

princes of Ch'i, Cheng and Lu in 712,<sup>46</sup> took refuge in the state Wei, *pen Wei* [L 33, C 57]. There are also four cases of refuge, recorded without the word *pen*, but pointing equally to the custom of asylum. During the usurpation in the state Wei in 719, the brother of the murdered prince was in refuge in the state Hsing, whence the nobility of Wei called him back to become the prince when the usurper had been removed by extraterritorial execution [L 17, C 29]. The Prince of the little state Jui, driven away in 709 by the dowager mother because she hated his many favorites, went to dwell in \*Wei<sup>47</sup> [L 43, C 79]. The Prince of \*Chou<sup>48</sup> in 707 went to the state Ts'ao and early the next year to the state Lu, where his coming is recorded as a court visit, *ch'ao*, but the text indicates a situation of flight and refuge by saying that he saw the danger of, or in, his own state and did not return [L 46, 48, C 85]. Eight states, all in the northern area, give asylum in the foregoing nine cases; implying a general acknowledgment of a right of asylum among the nobility of the northern states.

### 8. MEDIATION

Mediation was customary, not only in the sense of peacemaking but also in a broader sense of agency in transacting interstate affairs. The mediator might be a prince or a minister, and might act at request or on his own initiative. The mediation among states was merely the interstate aspect of a practice deeply embedded in Chinese life. Mediation in the broadest sense, as also an extension of the same principle to the point of intervention, is one of the characteristic customs enabling closely-crowded society to continue in peaceable existence.

Retaliatory warfare lasting four years, begun in 719 by the allied siege of the East Gate of the Cheng capital, already mentioned, was ended through the mediation of the state Ch'i,<sup>46</sup> the great peacemaker of the time. A preliminary meeting, *yü*, of the princes of Sung and Wei in 715 has been given under Conferences. The narrative continues:

- CC In the autumn quarter, the 7th month, the 7th cyclic day, the princes of the states Sung, Ch'i, and Wei covenanted at Wa-wu.  
 TC The nobility of the state Ch'i finally made a peace for the states Sung and Wei with the state Cheng. In the autumn quarter the conference took place at Wen. The covenant was solemnized at Wa-wu [both sites in Chou territory]. Thus was settled the incident of the East Gate. [L 25, 26, C 46.]

In the absence of a representative for the state Cheng at either conference or covenant, the Prince of Ch'i not only negotiated the peace but acted for Cheng in the concluding formalities. This peace treaty of Wa-wu, the first of which the *Ch'un Ch'iu* records more than two princes participating in person, is noted as a great event in the history of the period. The good offices of the state Ch'i were again exercised in the year 715 in the effort to

<sup>46</sup> *Supra*, note 39.

<sup>47</sup> *Supra*, note 22.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Supra*, note 21.

heal the breach between the King of Chou and the Prince of Cheng, referred to under Court Visits.

An enmity between the states Lu and Chü was terminated in 721 by the mediation of the state Chi, signalized by a covenant in which Chi acted for Lu in the same manner as Ch'i acted for Cheng in the treaty of Wa-wu:

CC & TC In the winter quarter, Tzu Po of the state Chi and the Prince of the state Chü covenanted at Mi.

TC This was done on behalf of the state Lu. [L 8, 10, C 15.]

The Prince of Chi, who had just married the eldest daughter of the Prince of Lu [C 14-15], caused the mediation perhaps by way of favoring his new father-in-law. Tzu Po<sup>50</sup> may possibly have been prince of a state of his own, as well as minister in the state Chi, after a common custom. He had escorted the princess from Lu to Chi for the marriage; and he negotiated the Lu-Chü peace covenant in the name of Chi. Six years later, in 715, this peace was confirmed by a covenant in which the Prince of Lu participated:

CC In the 9th month, on the 28th cyclic day, the Prince [of Lu] and a noble [the prince ?] of Chü covenanted at Fu-lai.

TC The Prince and a noble of Chü covenanted together at Fu-lai in order to complete the good offices of Chi. [L 25, 26, C 46.]

The foregoing mediations occurred in the northern area. In the Yangtse area, in a case in 703, quoted under Envoys, the Prince of the state Pa requested the Kingdom of Ch'u to intercede to improve relations with the state Teng. The King of Ch'u complied by sending an envoy to accompany the Pa representative on a courtesy mission to Teng. Such mediation, to make peace or to relieve strained relations, seems to have been customary among the states generally.

Marriage was commonly negotiated by intermediary, and at times, though not always, a ruling prince functioned as intermediary in marriage arrangements between ruling houses. By the rigorous custom of exogamy, all nobles married outside their clans.<sup>51</sup> The intermediary apparently should belong to the same clan as the bridegroom. The Prince of Lu is supposed to have been the intermediary in the marriage of the King of Chou in 704, on evidence of the stop of the Chou envoy at the Lu capital while en route to escort the future queen from her home in the state Chi [L 52, C 98]. The orthodox tradition is that the Kings of Chou regularly had for marriage agents ruling princes belonging to their own clan *Chi*. The house of Lu belonged to this clan, and probably also the Prince of Chai who was the Chou envoy in the final marriage mission.

A case of mediation in the sense of agency in interstate economic affairs occurred in 717:

TC In the winter quarter, officers of the capital [of the Kingdom of Chou] came [to Lu] to report a dearth of food. The Prince [of Lu]

<sup>50</sup> Tzu Po, named Lieh Hsü. *Tzu Po* may be a princely title.

<sup>51</sup> *Supra*, note 23.

on their behalf requested grain-purchasing privileges of the states Sung, Wei, Ch'i and Cheng. This was proper. [L 21, C 39.]

It is scarcely possible that Lu was merely passing the burden of a request for famine relief. Cheng, Wei and Sung were located nearer to Chou, and the Chou envoy must have passed through at least one of these states en route to Lu. The grain could be transported from these three states to Chou with less cartage than from Lu and Ch'i. At this time there appears to have been no rift to embarrass direct request, and the call on Lu points to a custom. Presumably the King of Chou selected the Prince of Lu in this instance, just as he selected the next Prince of Lu for marriage intermediary. The king seems to have been courting the influence of Lu, or at least cultivating its good-will, as witness the five courtesy missions which he sent to Lu during 716-704.

Data of the twenty-year period are insufficient to delimit the custom of agency among princes, but at least indicate that princes did act as intermediaries not only in peacemaking but also in transactions not involving hostilities or threat of war.

There are also incidents in the annals for these years which point to still other customs of the nature of the law of peace, such as exchange of hostages (*chih*) as between Chou and Cheng [L 13, C 18]; recognition after irregular succession, as in Sung [L 39, C 68-69]; mandate or protectorate, as in Hsü [L 33, C 57-60]. A case suggesting extraterritoriality, or extra-clan immunity, has been mentioned under Envoys. For the purpose of inducing custom, these isolated cases must be collated with similar cases of later years. The richer record of the 6th and 7th centuries not only provides evidences of these and other customs but adds particulars to the customs which have been induced here from the relatively few cases in the span of 722-703.

The same applies to the early Chinese customs corresponding to the law of war. Acquisition of territory by conquest has been mentioned.<sup>52</sup> The text of the twenty years has abundant cases of reprisal and intervention, and a few illustrating the gallant code of battle. There is little in this part of the text, however, bearing on the extinction of states, which became more and more common; and nothing on the recognition of new states, which was infrequent throughout this time.

The customs of mediation, asylum, covenant and treaty-making, and the customary forms of interstate communication, here described, are common elements of the Asiatic rudimentary international law. These customs of peace are routine aspects of interstate intercourse at a time characterized by a high degree of independence and equality of states. State sovereignty in general began to fail soon after 700 B.C. under the system of hegemonies;<sup>53</sup> and the routine customs, those which may be assumed to have been old and familiar, tend to be overshadowed by spectacular episodes of later years. The impression is that the late 8th-century picture represents a peace-time

<sup>52</sup> *Supra*, note 39.

<sup>53</sup> *Supra*, note 21.

pattern of long standing, but it is impossible to assume a static history. The temper of interstate relations certainly changed in the 6th and 7th centuries. The situation at the closing years of the 8th century is a departure point for comparison with evolving custom in later centuries and for inferring earlier developments.

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## TWO PROBLEMS OF APPROACH TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE\*

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In its attempt to forge a lien between the process of pacific settlement outlined in the Covenant of the League of Nations and the judicial process provided for by the Statute of the Permanent Court of International Justice, the Special Assembly of the League of Nations dealing with the Chaco dispute has broken some new ground. The effort made in its report of November 24, 1934,<sup>1</sup> was not successful, or not wholly so;<sup>2</sup> but it may have established a precedent which will serve in the future, and for this reason it seems to deserve some special attention.

### I

Throughout the consideration of the Chaco dispute by the Council and Assembly of the League of Nations, both Bolivia and Paraguay expressed a desire to submit their differences to arbitration. When the Special Assembly came to the drafting of its report under paragraph 4 of Article 15 of the Covenant, it was therefore natural that an attempt should be made to give effect to this desire of the parties to the dispute. This course was necessitated also by the fact that at no time did it seem possible for the Council or the Assembly itself to recommend a precise frontier for acceptance by Bolivia and Paraguay.<sup>3</sup> The Special Assembly could do no more toward a final settlement of the dispute than to present to the parties a plan for the conduct of peace negotiations, and in recommending a conference at Buenos Aires it was compelled to envisage a possible failure of such negotiations. Hence, a suggestion of recourse to judicial settlement was always maintained in the program upon which the Assembly's recommendations were based.

The report adopted by the Special Assembly on November 24, 1934, contained a series of recommendations which the parties were invited to accept as "an indivisible whole," and which included the following:<sup>4</sup>

\* A study prepared for a publication in tribute to Professor Karl Strupp.

<sup>1</sup> Records of the Special Assembly (League of Nations Official Journal, Supplement No. 132), pp. 43-51.

<sup>2</sup> The recommendations in the Assembly's report were not accepted by Paraguay, but the report may have led to certain provisions in the Buenos Aires Protocol of June 12, 1935, looking toward a possible submission of the Chaco dispute to the Permanent Court of International Justice. However, those provisions amount to little more than an agreement to agree to go to the Court. See League of Nations Document C.270.M.137.1935.VII.

<sup>3</sup> This was attributed by M. Osusky (Czechoslovakia) to the lack of data. Records of the Special Assembly, p. 24.

<sup>4</sup> *Ibid.*, p. 49.

14. By accepting the present recommendations, the Parties agree that, if, on the expiry of a period of two months from the opening of the conference, the frontier shall not have been fixed by negotiations, or if no arbitration agreement shall have been concluded, the Permanent Court of International Justice shall be called upon to give judgment in accordance with the provisions hereinafter set out. Such acceptance shall be deemed to constitute a special agreement within the meaning of Article 40 of the Statute of the Permanent Court of International Justice, and the Secretary-General shall forward the present report to the Court on behalf of the Parties.

The Court shall examine all the circumstances of the case and shall apply the rules of law enumerated in Article 38 of its Statute, due regard being had to:

a) The accession of the Parties to the Declaration of the American nations, dated August 3rd, 1932;

b) The adherence of the Parties to the principle of the *uti possidetis* of 1810, which was accepted by both Parties at the Buenos Aires Conferences of 1928.

The jurisdiction vested in the Court shall be as follows:

Whereas there exists between Bolivia and Paraguay a territorial or frontier dispute and whereas what one Party considers to be exercise of its territorial sovereignty is considered by the other Party to be usurpation upon its rights and an illegal occupation, to examine the titles and arguments presented on either side, and, as the result of such examination, to give judgment and declare whether there are districts and, if so, what districts, which one or other of the Parties should evacuate and hand over to the other Party as falling under the latter's sovereignty, the two Parties undertaking in advance to accept and execute the judgment of the Court.

The Assembly's report did not depart from precedents in providing that the Court should have "due regard" to the accession of the parties to the Declaration of August 3, 1932,<sup>5</sup> and to their adherence to the principle of the *uti possidetis* of 1810. On other occasions, special agreements have laid down law by which the Court was to be guided. Nor is any objection to be raised to the statement of the precise question upon which the Court was to have given judgment; the generality of the statement did not destroy its justiciable character. The undertaking by the parties "in advance to accept and execute the judgment of the Court" probably added nothing to the obligation which would have existed without it.

No difficulty should have arisen as to the sufficiency of this provision to constitute a special agreement, if both of the parties to the dispute had accepted the recommendations of the Special Assembly. Under Article 36 of the Statute, the Court's jurisdiction "comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions

<sup>5</sup> Though it may be difficult to see how the provisions of this Declaration were relevant to a consideration of the question upon which the Court was to give judgment. For the text of the Declaration, see League of Nations Official Journal, Special Supplement No. 124, p. 147.

in force." This language would quite clearly have embraced the Chaco dispute if paragraph 14 of the recommendations had been accepted by Bolivia and Paraguay, and in view of the practice of the Court to date,<sup>6</sup> it would probably have had no difficulty in establishing its jurisdiction under the provision in the Assembly's report. The Statute of the Court prescribes no particular formalities for a special agreement, which may even be consummated in the course of proceedings before the Court. An agreement need not contain any provision for ratification, though if it does contain such a provision the Court will assure itself of the fulfillment of the requirement.<sup>7</sup>

Even where the Court may be said to have jurisdiction, however, it does not act of its own motion to exercise its jurisdiction. A case must be "brought before the Court" (*portée devant la cour*). Article 40 of the Statute covers this process by providing two methods of bringing a case before the Court: (1) by notification of a special agreement, and (2) by application. "In either case the subject of the dispute and the contending parties must be indicated."

A question may be raised whether a case can be brought before the Court by application where there is a special agreement; whether, in other words, the existence of a special agreement requires a notification of it, rather than an application, for bringing a case before the Court. As an application under these circumstances would probably set out the special agreement, the question is not very important unless it be thought that all the parties to a special agreement must collaborate in making the required notification of it. It is to be noted, however, that Article 35 of the Rules has always distinguished between cases "brought before the Court by means of a special agreement" and "all other cases in which the Court has jurisdiction," applications being referred to only for cases in the latter category.

The Special Assembly's report provided that "the Secretary-General shall forward the present report to the Court on behalf of the Parties." This meant, no doubt, that such action was to be taken by the Secretary-General only after both of the parties had accepted the recommendations in the report. The records are not altogether clear as to the purpose of including this provision, but it would seem from a statement by M. Osusky<sup>8</sup> that it was designed as "a formula permitting of the strict application of the provisions" of Article 40 of the Statute. Yet the question arises whether this "forwarding" by the Secretary-General could serve as the notification of the special agreement which is provided for in Article 40 of the Statute and mentioned in Article 35 of the Rules.<sup>9</sup> Certainly "notification" has hitherto been thought

<sup>6</sup> See Hudson, *Permanent Court of International Justice* (1934), § 407.

<sup>7</sup> Publications of the Court, Series E, No. 12, p. 157.

<sup>8</sup> Records of the Special Assembly, p. 32.

<sup>9</sup> Article 35 of the Rules is badly drafted. It provides in the first paragraph that "when a case is brought before the Court by means of a special agreement (*par un compromis*), the latter, or the document notifying the Court of the agreement, shall mention: *etc.*" This

of as an act of one or more of the states parties to the dispute to which the special agreement relates, and it may be important to keep the conception within that limit. Otherwise, the Court might find itself seised of a case relating to a dispute, with all of the parties to the dispute refraining from any presentation to the Court. In that event, it would hardly be possible, even if the facts were clear and well known, for the Court to take any action; it could only declare a *non possumus*. Article 53 of the Statute empowers the Court to give judgment in the absence of one party, but only if the other party calls upon it to do so. For this reason, one may query whether the formula in the Special Assembly's report would have dispensed with the necessity of a notification by Bolivia or by Paraguay or by both.

Since it is based upon jurisdiction previously conferred, an application to the Court may be made by a single party. On the other hand, notification of a special agreement is usually made by all the parties to the agreement, or by one of the parties acting under an express provision for such notification in the special agreement itself. Where a special agreement is entered into, it will probably be the sole source of the Court's jurisdiction for the case which it covers. Yet this can hardly be a reason for requiring that notification must be effected by all of the parties. If an application under a treaty in force may be made by a single party to the treaty, why may not notification of a special agreement be made by a single party to the agreement? (It is assumed, of course, that all formalities will have been completed for bringing the agreement into force.) This view does not seem to have been taken by the Court, however, if one may judge by the following statement appearing in its annual reports:<sup>10</sup>

In order that a case may be validly brought before the Court, notice of the special agreement must be given by all the Parties, unless it is expressly laid down in one of the clauses of the special agreement that the Court may take cognizance of the case upon notice being given by one party only.

In defense of this view, it may be said that a requirement of notification by all parties to a special agreement affords the Court an assurance, not simply of their having conferred jurisdiction, but also of their coöperation in the presentation of the case. Yet, as there is nothing in the Statute which points to such a necessity, the view of the Court may be thought to be unduly exigent.

The forwarding of the special agreement by the Secretary-General, as envisaged in the Assembly's report of November 24, 1934, may have to be considered as a notification by both Bolivia and Paraguay, if it is to be deemed sufficient for bringing the case before the Court. In this event,

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language is not in harmony with the provision in Article 40 of the Statute, which envisages only notifications of special agreements and applications for bringing cases before the Court.

<sup>10</sup> Series E, No. 9, p. 65; No. 10, p. 39; No. 11, p. 43. The point ought to be covered by the Rules, and a revision of the Rules in this respect seems desirable.

however, the Court would lack the particulars prescribed by Article 35 of the Rules, *viz.*, the names of agents and the addresses to which notices should be sent.

In view of possible uncertainty on this point, the question arises whether a better form of statement could not have been devised for inclusion in the Assembly's report. Would not the following draft of the second sentence of paragraph 14 have accomplished the result sought without raising the problem as to notification?

Such acceptance shall be deemed to constitute a reference to the Court within the meaning of the first paragraph of Article 36 of the Statute of the Permanent Court of International Justice, and either party to the dispute may bring before the Court the question hereinafter stated by an application under Article 40 of the Statute.

If such a formula would have lacked the apparently automatic feature of the provision actually adopted, it might nevertheless have corresponded more closely to the necessities of the situation.

## II

A second problem presented by the Special Assembly's report of November 24, 1934, relates to the extent to which the Assembly can delegate its power to request an advisory opinion. The original draft of the report <sup>11</sup> contained no provision which would have raised this question. On November 21, 1934, M. Undén (Sweden) pointed out that without the coöperation of both Bolivia and Paraguay neither the plan for negotiations at Buenos Aires nor the submission to the Court could become effective, and that the Advisory Committee to be set up would then have no way of availing itself of the aid of the Court. On behalf of the Danish, Norwegian, Spanish, Swedish, and Swiss delegations he presented to the Assembly a draft of a resolution containing the following: <sup>12</sup>

The Assembly, . . .

Considering that, if one or other party does not accept the Assembly's recommendations, it will be essential to determine the responsibility incurred, in order to enable Members of the League of Nations to apply, if necessary, Article 10 of the Covenant:

Decides that, in the event of the recommendations not being adopted by the two parties by December . . . 1934, the Permanent Court of International Justice shall be requested to give an advisory opinion on the following question:

Whereas there exists between Bolivia and Paraguay a territorial dispute or a dispute relating to frontiers, and whereas what one of the parties regards as the exercise of its territorial sovereignty is regarded by the other party as a usurpation of its rights and an illegal occupation, are there any regions—and, if so, which—that should be evacuated and handed over by one of the parties to the other?

<sup>11</sup> League of Nations Document A. (Extr.) 1.1934.VII.

<sup>12</sup> Records of the Special Assembly, p. 26.

Instructs the Secretary-General to submit to the Court a request with this object and to give the Court such assistance as may be necessary in the examination of the case.

This suggestion led the General Committee of the Assembly to propose that the Assembly delegate its power to request an advisory opinion to the Advisory Committee set up to follow the dispute, "just as if the latter [the Assembly] were itself deciding now to ask for [an] advisory opinion." Hence, the final report came to contain the following:<sup>13</sup>

The Secretary-General shall submit to the Permanent Court of International Justice, on behalf of the Assembly, a request for an opinion under Article 14 of the Covenant, should the Advisory Committee of the Assembly consider such a consultation to be justifiable and opportune with a view to facilitating the performance of the task entrusted to it. The terms of the question and the date of the request shall be determined by the Committee.

If the Assembly's report had been accepted by both Bolivia and Paraguay, this provision would have raised for the first time<sup>14</sup> a serious question as to the propriety of the delegation of the Assembly's power.

It is hardly to be questioned that a sound policy underlies the provision in Article 14 of the Covenant of the League of Nations incorporated by reference into Article 1 of the Statute of the Court, which requires that requests for advisory opinions must emanate from the Assembly or the Council of the League of Nations. If something may be said for allowing all the parties to a dispute to request an advisory opinion relating to that dispute, no sound argument is to be made for extending this privilege to a single party to a dispute. Advisory jurisdiction is in no sense a substitute for obligatory settlement, and in the present state of international law, as the Court said in the *Eastern Carelia Case*,<sup>15</sup> "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." The innovation of advisory jurisdiction having been adopted, the protection of states lies in the requirement of action by the Assembly or the Council before this jurisdiction can be exercised. These bodies are in a position to appreciate the general interest which may be affected by resort to the Court for an advisory opinion, and though it has not yet been determined whether they must be unanimous in voting a request,<sup>16</sup> their rules will presumably permit any state opposing a request to be heard and to have its reasons for such opposition weighed and considered. It is of the essence of this system, therefore, that one of these

<sup>13</sup> Records of the Special Assembly, p. 51.

<sup>14</sup> The Assembly resolution of March 11, 1932, relating to the Committee set up to follow the Manchurian situation, empowered the Committee to propose to the Assembly, if necessary, that it make a request for an advisory opinion. *League of Nations Official Journal*, Special Supplement No. 101, p. 88. This involved no question of delegation.

<sup>15</sup> Series B, No. 5, p. 27.

<sup>16</sup> See Hudson, *Permanent Court of International Justice* (1934), § 454.

bodies should carefully consider any proposal that an advisory opinion be requested, in the light of both general and special interests.

Such consideration of proposals for requesting advisory opinions would seem to make a general delegation of the power to request, by either the Assembly or the Council, very questionable. The evil of delegation is the substitution of one judgment for another.<sup>17</sup> If international law is to be developed through advisory opinions given by the Court at the request of the Assembly or the Council, the Court should not be made the agency of such development when the desirability of its giving advisory opinions has been judged, not by the Assembly or Council, but merely by some agent of one or both of these bodies. If the Assembly should purport to delegate to the Advisory Committee for Communications and Transit the power to request advisory opinions whenever the latter found occasion to do so, the Court might be justified in refusing to entertain any request emanating from that Advisory Committee. The point would be even clearer if the agent were not a body wholly subject to the Assembly or Council; for example, if power to request an advisory opinion were delegated to the European Commission of the Danube, or to the International Committee of the Red Cross, or to the Universal Postal Congress. It was this general order of ideas which led to a refusal, when the Court's Statute was being drafted, to confer on the Governing Body of the International Labor Office the power to request advisory opinions.<sup>18</sup>

A special consideration militating against the propriety of any general delegation results from the doubt now existing as to the vote required in the Assembly or the Council for the adoption of a request for an advisory opinion. The importance of this question is generally admitted, and it has been quite recently referred to.<sup>19</sup> If it should be determined that only a majority vote is needed, it could hardly be said that a delegation could be effected by a majority vote; and a new question would arise whether the body to which power was delegated would have to be unanimous in its action.

Moreover, interests of the Court itself are to be considered. Experience has now shown that it suffers no diminution of prestige or usefulness in giving advisory opinions at the request of the Council. If, however, it must give advisory opinions when they are requested by other international bodies to which the Assembly or the Council may have delegated its powers, the Court's prestige might be impaired and its authority might be diminished. It was not created to be, and it should not be made to become, a general legal adviser to any international body.

The conclusion seems to follow that a general delegation by either the

<sup>17</sup> The Supreme Court of the United States has recently made this clear in *Panama Refining Co. v. Ryan* (1935), 293 U. S. 388.

<sup>18</sup> Records of the First Assembly, Committees, I, pp. 534, 563.

<sup>19</sup> League of Nations Official Journal, 1935, p. 170. See also Journal of the Sixteenth Assembly (1935), p. 121.

Assembly or the Council of its power to request advisory opinions would be *ultra vires*, and might properly be ignored by the Court. Whether the delegation were to a body functioning under the direction of the Assembly and Council, or to a body wholly independent in its operations, the vice would be the same. Neither kind of body could exercise that judgment which has been entrusted to the Assembly and to the Council, alone.

Within some limits it may be possible for the Assembly or the Council, without violating this constitutional limitation, to take into account the functioning of other international bodies in making requests to the Court for advisory opinions. It would certainly be competent for the Assembly to vote a request for an advisory opinion on a precise question and to instruct the Secretary-General to communicate this request to the Court only in the event that within a definite period of time some other body—the Governing Body of the International Labor Office, for example—should take certain action.

In the light of these considerations, some doubt may be entertained as to the propriety of the provision in the Assembly's report of November 24, 1934. The Advisory Committee set up to deal with the Chaco dispute was to be composed of representatives of certain states, but it was to have the collaboration of two states not members of the League "in the manner which they shall consider most appropriate." It was to consider whether "such a consultation" as is involved in asking for an advisory opinion was "justifiable and opportune with a view to facilitating the performance of the task entrusted to it"; judgment on this point was not exercised by the Assembly, but it was left entirely to the Advisory Committee. The "terms of the question" to be submitted to the Court, if any decision should be taken by the Advisory Committee to request an opinion, were to be determined by the Committee, not by the Assembly; it is to be noted that M. Undén's proposal had not gone so far. Likewise, the time when any request should be made was left to the Advisory Committee. All of this looks very much like an attempted general delegation of power by the Assembly, which may be thought to have been of questionable validity even though the Advisory Committee may be taken to have been wholly responsible to the Assembly. Certainly it was not saved from invalidity by the mere statement that the Secretary-General should submit the request to the Court "on behalf of the Assembly."

While the question as to the propriety of this delegation does not depend upon the Court's own rules, it may be noted that the 1931 Rules lack precision in their indication of the source of a request, and perhaps a revision in the light of the Assembly's report of November 24, 1934, is now needed.

## NEUTRALITY OF THE UNITED STATES

BY JAMES BROWN SCOTT

*Chairman, State, War and Navy Neutrality Board from  
August, 1914, to April, 1917*

Since the Treaty of Versailles—more in the nature of an armistice than a treaty of peace—we have from time to time heard rumors of wars; and today a state of war exists. Therefore neutrality is no longer a mere conception, it is a fact; and, as wars are contagious—at least they were a few years ago—many people there are who look upon a world war as a dread possibility, unless the present machinery of peace proves itself competent to bring about and to preserve peace.

In the meantime, the Government of the United States recognizes the existence of an actual, if undeclared, war between Ethiopia and the Royal Italian Government, and therefore the citizens and residents of the United States have been admonished by presidential proclamation to abstain from any and every unneutral act as defined by the laws of the United States. Omitting for present purposes the preliminary paragraphs of the proclamation (which quote the pertinent provisions of the Joint Resolution of Congress referred to below), and reserving for subsequent comment the President's definition of arms, ammunition and implements of war, his exact words are:

Now, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred on me by the said joint resolution of Congress, do hereby proclaim that a state of war unhappily exists between Ethiopia and the Kingdom of Italy; and I do hereby admonish all citizens of the United States or any of its possessions and all persons residing or being within the territory or jurisdiction of the United States or its possessions to abstain from every violation of the provisions of the joint resolution above set forth, hereby made effective and applicable to the export of arms, ammunition, or implements of war from any place in the United States or its possessions to Ethiopia or to the Kingdom of Italy, or to any Italian possession, or to any neutral port for transshipment to, or for the use of, Ethiopia or the Kingdom of Italy.

This proclamation we believe to be a state paper of the utmost importance as regards its subject matter; and in its form it is of commendable dignity and poise. It accepts in measured phrase the doctrine of continuous voyage and of ultimate destination in that it prohibits not only direct trade with belligerents, but also indirect shipments, whether by sea or by land, to neutral ports "for transshipment to, or for the use of," the belligerents.

What is the present law of the United States on neutrality?

On the last day of August, 1935, Franklin Delano Roosevelt, the President

## NEUTRALITY OF THE UNITED STATES

of the United States, signed a Joint Resolution of the Congress "providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war."

By the Joint Resolution the President was directed, upon "the outbreak" of hostilities or during the progress of war between, or among, two or more foreign states, to proclaim the existence of a state of war, and immediately upon the issuance of his proclamation, it would become "unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states, or to any neutral port for transshipment to, or for the use of, a belligerent country."

What, then, are these "arms, ammunition, or implements of war," the export of which is prohibited by the Joint Resolution in question? The President is not merely empowered but commanded "definitely" to enumerate them. This he did in his proclamation of the 5th of the present October, in the following terms:

And I do hereby declare and proclaim that the articles listed below shall be considered arms, ammunition, and implements of war for the purposes of section 1 of the said joint resolution of Congress:

### *Category I*

- (1) Rifles and carbines using ammunition in excess of cal. 26.5, and their barrels;
- (2) Machine guns, automatic rifles, and machine pistols of all calibers, and their barrels;
- (3) Guns, howitzers, and mortars of all calibers, their mountings and barrels;
- (4) Ammunition for the arms enumerated under (1) and (2) above, i. e., high-power steel-jacketed ammunition in excess of cal. 26.5; filled and unfilled projectiles and propellants with a web thickness of .015 inches or greater for the projectiles of the arms enumerated under (3) above;
- (5) Grenades, bombs, torpedoes, and mines, filled or unfilled, and apparatus for their use or discharge;
- (6) Tanks, military armored vehicles, and armored trains.

### *Category II*

Vessels of war of all kinds, including aircraft carriers and submarines.

### *Category III*

- (1) Aircraft, assembled or dismantled, both heavier and lighter than air, which are designed, adapted, and intended for aerial combat by the use of machine guns or of artillery or for the carrying and dropping of

bombs or which are equipped with, or which by reason of design or construction are prepared for, any of the appliances referred to in paragraph (2) below;

(2) Aerial gun mounts and frames, bomb racks, torpedo carriers, and bomb or torpedo release mechanisms.

#### *Category IV*

Revolvers and automatic pistols of a weight in excess of 1 pound 6 ounces (630 grams), using ammunition in excess of cal. 26.5, and ammunition therefor.

#### *Category V*

(1) Aircraft, assembled or dismantled, both heavier and lighter than air, other than those included in category III;

(2) Propellers or air screws, fuselages, hulls, tail units, and under carriage units;

(3) Aircraft engines.

#### *Category VI*

(1) Livens projectors and flame throwers;

(2) Mustard gas, lewisite, ethyldichlorarsine, and methyldichlorarsine.

This is the first enumeration but it need not be the last. Indeed the President is specifically empowered by the second section of the Joint Resolution from time to time to proclaim, upon the recommendation of the National Munitions Control Board—composed of the Secretary of State as chairman and executive officer, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy and the Secretary of Commerce—"a list of articles which shall be considered arms, ammunition, and implements of war for the purposes of this section."

The Joint Resolution and the proclamation speak of the "United States," and the resolution defines "United States" (when the term is used in a geographical sense as on the present occasion) as meaning "the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia." In this connection, it should also be stated that the Joint Resolution defines the term "person" (which would otherwise be elusive) to include "a partnership, company, association, or corporation, as well as a natural person."

The "sanction" for the law—to use a current term, although we personally prefer "penalty"—is provided in the fourth paragraph of Section 1 of the Joint Resolution and in the Act of Congress approved June 15, 1917, after the entry of the United States into the World War. By the terms of the Joint Resolution, whoever, in violation of its provisions, exports, or endeavors to export or causes to be exported "arms, ammunition, or implements of war from the United States, or any of its possessions, shall be fined not more than \$10,000 or imprisoned not more than five years, or both;" and it is further provided that "the property, vessel, or vehicle containing" such "arms, ammu-

nition, or implements of war . . . shall be subject to the provisions" of the Act of June 15, 1917, above mentioned—an Act which, among other things, provides for the detention and forfeiture of the carrier and its equipment. What will happen, however, to the arms and implements of war in such case? They too are subject to forfeiture and confiscation by the Government of the United States.

What is the machinery by which the Joint Resolution is to be made effective? We have already spoken of the membership of the National Munitions Control Board and of the sense in which the terms "United States" and "person" are used. How is the board to exercise supervision and control over these "persons," the makers, exporters and importers of munitions? Every "person" engaged in one or other of such activities is required by Section 2 of the Joint Resolution to "register with the Secretary of State his name, or business name, principal place of business, and places of business in the United States, and a list of the arms, ammunition, and implements of war which he manufactures, imports, or exports." And it is further provided that every registrant "shall pay a registration fee of \$500," upon the receipt of which "the Secretary of State shall issue a registration certificate valid for five years, which shall be renewable for further periods of five years upon the payment of each renewal of a fee of \$500."

This, however, is not all. Once registered, the "person," as defined in the Joint Resolution, is required also to "notify the Secretary of State of any change in the arms, ammunition, and implements of war which he exports, imports, or manufactures." Upon receiving such notification, "the Secretary of State shall issue to such person an amended certificate of registration, free of charge, which shall remain valid until the date of expiration of the original certificate."

So much for the process of registration.

The next step in the matter of supervision and control is the issuing of licenses to exporters or importers of arms, ammunition and implements of war; but such licenses are not to be issued in cases "where exportation of arms, ammunition, or implements of war would be in violation of this Act or any other law of the United States, or of a treaty to which the United States is a party."

And finally, no "officer, executive department, or independent establishment of the Government" of the United States may purchase "arms, ammunition and implements of war . . . on behalf of the United States . . . from any person who shall have failed to register under the provisions of this Act."

The National Munitions Control Board, which is required to "hold at least one meeting a year," has certain further duties, among which are the designation for inspection, where deemed advisable, of certain "permanent records" of registrants under the joint resolution, and the making of "an annual report to Congress," copies of which are to be "distributed as are other reports trans-

mitted to Congress," and finally, as already noted, the recommendation, from time to time, to the President of articles which should be included in the "arms, ammunition and implements of war," whose export to belligerents is forbidden.

The Joint Resolution contains two further provisions which may appropriately be mentioned here. The first is set forth in Section 8 and is self-explanatory: "If any of the provisions of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby." The second of these provisions, which requires no comment, is to be found in the last paragraph of the first section, providing that "except with respect to prosecutions committed or forfeitures incurred prior to March 1, 1936, this section and all proclamations issued thereunder shall not be effective after February 29, 1936."

These are what may be termed the leading features of the Joint Resolution and the provisions making it effective.

There are, however, certain other features which, although they are not, in existing circumstances, of immediate interest, involve matters which in the past have been of notable importance and which may in the future be of equal or of greater importance.

The fourth section of the Joint Resolution deals with the problem which arises from the "hovering"—to use a technical expression—of belligerent ships outside the ports of the United States, with a view to obtaining equipment or supplies. The President has the power to forbid the departure from a port of the United States of "any vessel, domestic or foreign, whether requiring clearance or not," which he—or any person authorized by him—believes to be about to carry to a "warship, tender, or supply ship of a foreign belligerent nation" "men or fuel, arms, ammunition, implements of war, or other supplies," such action to be taken in pursuance of the Act of June 15, 1917. If, however, the evidence in a particular instance is not sufficient to justify forbidding the departure of the vessel in question under that Act, then under Section 4 of the Joint Resolution the President should—if in his judgment such action is in the interest of the maintenance of peace between the United States and foreign Powers, or is calculated "to protect the commercial interests of the United States and its citizens, or to promote the security of the United States"—require from the owner or master of the vessel, prior to its departure, "a bond to the United States, with sufficient sureties, in such amount" as he may "deem proper, conditioned that the vessel will not deliver the men, or the cargo, or any part thereof, to any warship, tender, or supply ship of a belligerent nation."

There is a final provision in this section which makes the solution of the problem of hovering vessels well-nigh complete; for the President is further authorized, in case a vessel has previously cleared from a port of the United States and "delivered its cargo or any portion thereof to a warship, tender,

or supply ship of a belligerent nation," to prohibit "the departure of such vessel during the duration of the war."

The development of submarines has created new questions for neutrals, and the Joint Resolution takes cognizance of these questions. Under its fifth section, if, in the judgment of the President, the maintenance of peace and the security of the United States or the protection of "the commercial interests of the United States and its citizens" will be served by placing "special restrictions" on the "use of the ports and territorial waters of the United States or of its possessions, by the submarines of a foreign nation," the President may issue a proclamation laying down such restrictions, as a result of which it will "thereafter be unlawful for any such submarine to enter a port or the territorial waters of the United States or any of its possessions, or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe."

There is still another question which has become more pressing with the advent of the submarine, a question which acutely affected the United States on more than one occasion during the World War. It has to do with the travel of the citizens of neutral countries on the ships of a belligerent nation. Should a citizen traveling on such a vessel be entitled to expect protection from his government? Obviously, if protection is extended, it is only too likely to convert a neutral nation into a belligerent. By Section 6 of the Joint Resolution, this difficult question is met in what will doubtless be hailed by citizens of the United States as the most effective and sensible manner possible. Under the provisions of the sixth section, and with a view to the maintenance of peace and security, "or the protection of the lives of citizens of the United States, or the protection of the commercial interests of the United States and its citizens," the President, if he considers it inadvisable for citizens of the United States to travel as passengers on the vessels of the belligerent countries, shall issue a proclamation to that effect, whereupon "no citizen of the United States shall travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President shall prescribe." Such a prohibition naturally would not apply in the case of a citizen who had begun his voyage on a vessel of a belligerent prior to the date of the proclamation and who had not had an opportunity "to discontinue his voyage after that date."

It is also provided in Section 6 that the prohibition in question is not to apply until ninety days after the date of the President's proclamation "to a citizen returning from a foreign country to the United States or to any of its possessions."

It is to be observed that the President did not refer in his first neutrality proclamation to the section just mentioned concerning restrictions upon American citizens traveling in belligerent vessels. The matter, it would seem, was deemed to be of such fundamental importance as to require separate action. It was therefore embodied in a further proclamation, which, how-

ever, bears the same date (October 5, 1935). In it the President, after referring to the existence of a state of war "between Ethiopia and the Kingdom of Italy," continued:

WHEREAS I find that the protection of the lives of citizens of the United States requires that American citizens should refrain from traveling as passengers on the vessels of either of the belligerent nations;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the said Joint Resolution of Congress, do hereby admonish all citizens of the United States to abstain from traveling on any vessel of either of the belligerent nations contrary to the provisions of the said Joint Resolution; and

I do hereby give notice that any citizen of the United States who may travel on such a vessel, contrary to the provisions of the said Joint Resolution, will do so at his own risk.

The Joint Resolution of Congress is the present neutrality law of the United States, and the proclamations of the President have put that law into effect upon the recognition of the existence of a state of war across the water. They are historic documents of vast importance in the development of the law of neutrality.

There is, however, an additional document which is also of far-reaching significance in relation to the neutrality policy of the United States. It was issued to the press coincident with, but not as a part of, the first neutrality proclamation of the present President of the United States. It was a statement to the people of the United States which is fundamental, altering as it does the basis of our neutrality by removing the emphasis from "neutral rights" and therefore strengthening the conception of "neutral duties." And it may be observed in passing that nation after nation has gone to war for its neutral rights, but there is believed to be no instance, in the history of the world, of a nation voluntarily going to war for the performance of its neutral duties.

In this statement the President has admirably said:

In view of the situation which has unhappily developed between Ethiopia and Italy, it has become my duty under the provisions of the Joint Resolution of Congress approved August 31, 1935, to issue, and I am today issuing my proclamation making effective an embargo on the exportation from this country to Ethiopia and Italy of arms, ammunition and implements of war. Notwithstanding the hope we entertained that war would be avoided, and the exertion of our influence in that direction, we are now compelled to recognize the simple and indisputable fact that Ethiopian and Italian armed forces are engaged in combat, thus creating a state of war within the intent and meaning of the Joint Resolution.

In these specific circumstances I desire it to be understood that any of our people who voluntarily engage in transactions of any character with either of the belligerents do so at their own risk.

The meaning of the last sentence in the statement is clear and unmistakable. By it the present President has once again repudiated "dollar diplomacy" in favor of his policy of the "good neighbor," warning the American people that they are individually liable for all risks incurred through dealing directly or indirectly with the belligerent countries, in any and all commodities—or indeed in moneys, in loans or in "transactions of any character." In a word, the President serves notice upon the American people and the world at large that the Government of the United States holds itself no longer obliged to intervene in behalf of unneighborly, and indeed morally indefensible, contracts. And in issuing this statement, the President has recognized that insistence upon the so-called neutral right to make profit from other people's wars results in other people's wars becoming our wars.

Five days later, on October 10th, the Secretary of State was asked at a press conference, held in the Department of State, to explain the nature and effect of "what the President said about American interests trading with belligerents at their own risk." To this question—which was asked by one American citizen, a representative of the press, in behalf of all American citizens, Secretary Hull, statesman and man of affairs but a humanitarian to his fingertips, admirably responded:

As I said to you gentlemen heretofore, the language of the President's statement has thoroughly well-defined meaning and every person should be able to grasp its meaning and its implications. Technically, of course, there is no legal prohibition—apart from the proclamation governing the export of arms,—against our people entering into transactions with the belligerents or either of them. The warning given by the President in his proclamation concerning travel on belligerent ships and his general warning that during the war any of our people who voluntarily engage in transactions of any character with either of the belligerents do so at their own risk were based upon the policy and purpose of keeping this country out of war,—keeping it from being drawn into war. It certainly was not intended to encourage transactions with the belligerents.

Our people might well realize that the universal state of business uncertainty and suspense on account of the war is seriously handicapping business between all countries, and that the sooner the war is terminated the sooner the restoration and stabilization of business in all parts of the world, which is infinitely more important than trade with the belligerents, will be brought about.

This speedy restoration of more full and stable trade conditions and relationships among the nations is by far the most profitable objective for our people to visualize, in contrast with such risky and temporary trade as they might maintain with belligerent nations.

I repeat that our objective is to keep this country out of war.

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The Government of the United States has recognized that a state of war exists but it has done so independently and in its own behalf, leaving to the

members of the League of Nations to determine, with reference to the state of war which we have recognized as existing between two of its members—Ethiopia and Italy—what measures, if any, the League itself should take under the Covenant; for the Covenant does not affect the rights and duties of the United States, inasmuch as our country is not a party to that well-nigh universal agreement.

One hundred and forty-one years ago the Congress of the United States enacted the first neutrality statute, not merely of the Western World but of the entire world, and that statute was signed and approved on June 5, 1794, by George Washington, our first President. Thus was created a new law of neutrality, as is universally recognized by every international lawyer and publicist.

In 1935, the Congress of the United States put in statutory form the newer neutrality, which, on August 31, 1935, was approved as law by Franklin Delano Roosevelt, the present President of the United States, and put into execution by his proclamations of October 5, 1935. In his statement to the American people issued with his proclamation the logical implications of this statute are given their full expression and effect.

By its new neutrality, the Government of the United States remains a good neighbor in war as well as in peace.

"The old order changeth, yielding place to new!"

The people of the United States, so far as we are able to judge, deeply regret the condition of affairs which has caused the President to recognize a state of war as existing; but we believe that the American people will overwhelmingly, if not unanimously, repeat with Secretary of State Hull: "Our objective is to keep this country out of war."

## EDITORIAL COMMENT

### THE RECENT TRADE AGREEMENT WITH RUSSIA

A considerable amount of unfavorable comment has been occasioned by the recent trade agreement negotiated by the present administration with the Russian Government. This agreement was made by an exchange of notes under date of July 13, 1935, at Moscow, between the Ambassador of the United States and the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics.

The pertinent terms of the agreement are as follows:

One. The duties proclaimed by the President of the United States of America pursuant to trade agreements entered into with foreign Governments or instrumentalities thereof under the authority of the Act entitled, "An act to amend the tariff act of 1930," approved June 12, 1934, shall be applied to articles the growth, produce, or manufacture of the Union of Soviet Socialist Republics as long as this agreement remains in force. It is understood that nothing in this agreement shall be construed to require the application to articles the growth, produce, or manufacture of the Union of Soviet Socialist Republics of duties or exemptions from duties proclaimed pursuant to any trade agreement between the United States of America and the Republic of Cuba which has been or may hereafter be concluded.

Two. On its part, the Government of the Union of Soviet Socialist Republics will take steps to increase substantially the amount of purchases in the United States of America for export to the Union of Soviet Socialist Republics of articles the growth, produce, or manufacture of the United States of America.

Three. This agreement shall come into force on the date of signature thereof. It shall continue in effect for twelve months. Both parties agree that not less than thirty days prior to the expiration of the aforesaid period of twelve months they shall start negotiations regarding the extension of the period during which the present agreement shall continue in force.

The general purpose of this agreement conforms to the policy adopted by Congress in the Amendment of June 12, 1934, to the Tariff Act of 1930, which Amendment is added as Part III of that Act and is designed for the "Promotion of Foreign Trade." For that purpose the President is authorized by this Amendment

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof and (2) To proclaim such modifications of existing duties and other import restrictions, or such continuances, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President

has entered into hereunder. . . . The proclaimed duties and other import restrictions shall apply to articles of growth, produce, or manufacture of *all foreign countries*, whether imported directly or indirectly: *Provided* that the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this Section. . . . The President may at any time terminate any such proclamation in whole or in part.

The President has already entered into trade agreements under the authority of this enactment with Belgium, Haiti and Sweden, and, as appears from the above-quoted provisions of the authorizing amendment, the duties and other import restrictions provided for in such agreements shall apply to articles the growth, produce, or manufacture of all foreign countries when proclaimed by the President. He has already proclaimed the duties provided for in the agreement with Belgium and by letter to the Secretary of the Treasury dated April 1, 1935, he has directed that the duties thus proclaimed shall be applied to articles the growth, produce, or manufacture of the Union of Soviet Socialist Republics, among other states, "so long as such duties remain in effect and this direction is not modified in respect of such country."

In view of this situation it is not clear what, if anything, Russia gains by Article One of this recent agreement. It may be noted, however, that by Article Three of this agreement it is to remain in force for twelve months from its date so that the concessions under Article One do not depend upon the continuance of the Belgian agreement, which may be terminated at any time by the President.

On the other hand, by Article Two of this agreement with Russia a distinct benefit is secured to the United States in that Russia undertakes to increase substantially the amount of purchases in the United States for export to Russia of articles the growth, produce, or manufacture of the United States. This stipulation differentiates this agreement from those entered into or to be entered into under the authority of the enactment of June 12, 1934. It was not contemplated that those agreements were to be reciprocal in character, the only condition for their existence being that the foreign countries benefiting thereby should not discriminate against American commerce or take other action tending to defeat the purpose of the proposed agreements.

The announced policy of the American Government in entering into these agreements is that favored-nation treatment should be unconditional and extended to all nations on equal terms, in distinction from the earlier policy of making the favors extended conditional upon the granting of equivalent favors in return. This policy was distinctly announced by a high official of the Administration as follows:<sup>1</sup>

<sup>1</sup> Address of Assistant Secretary of State Francis B. Sayre, on Dec. 31, 1934, to the American Association for the Advancement of Science, Carnegie Institute of Technology, Pittsburgh, Pa.

In the making of trade agreements two possible courses lie open. The one is a policy based upon most-favored-nation treatment, a generalization of rates and an effort to accord equality of treatment and commercial privileges to all nations which do not discriminate against American trade. The other is a policy of trading with individual nations privilege for privilege on a bilateral bargaining basis, thus according frankly preferential treatment to individual countries with consequent general discrimination against others.

The policy of generalization of commercial treatment rather than special privilege and discrimination so far as one can judge in the light of present conditions, promises the largest return for the protection and promotion of American interests.

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But the most-favored-nation policy must not be misunderstood. It does not mean generalization of American concessions to countries which do not in fact generalize to us or which discriminate against American trade. The policy is a reciprocal one. By withholding concessions granted to other nations under our trade agreements now being negotiated from nations which do not in fact generalize their rates to us, we are in a position to exert considerable pressure in the promotion of our policies.

The reason for departing from this policy of asking no reciprocal favors in the Russian agreement, which stipulates for an increase in the purchase of exports from the United States to Russia as a condition or consideration for the agreement, is explained by the Department of State in an official announcement, on July 13, 1935, of the making of the Russian agreement, as follows:

The fact of the existence of a state monopoly of foreign trade in the Soviet Union makes it necessary to depart somewhat from the ordinary form of trade agreement being entered into by the United States.

This announcement further stated that, as already pointed out above:

This agreement with the Soviet Union, although intimately related to the trade agreements program of the United States, was not concluded pursuant to the Trade Agreements Act of June 12, 1934. It does not involve any reciprocal concession in respect of tariff rates.

The Legal Adviser of the Department of State has made an able and convincing argument in support of the constitutionality of the Trade Agreements Act of 1934,<sup>2</sup> but his argument does not cover this agreement with Russia, which was not made under the authority of that Act.

It has not the status of a treaty for the Senate has not given its consent to its ratification. Admittedly it was not made under the authority delegated by Congress to the President by the Trade Agreements Act of June 12, 1934. It stands simply as an Executive agreement, and the question presents itself

<sup>2</sup> Address by Honorable Green H. Hackworth, Legal Adviser of the Department of State, before the American Bar Association at its annual meeting, Los Angeles, Calif., July 16, 1935.

whether the Executive alone has the power to change tariff rates in favor of Russia as is done by this agreement.

It so happens, however, that as above noted, this agreement, as provided in Article One, simply extends to Russia the trade concessions granted in the trade agreement with Belgium, which, under the authority of the Amendment of 1934, are automatically extended to all foreign nations, including Russia. It, accordingly, adds nothing in that respect to the already existing situation which forms its basis. Presumably this agreement was drafted along these lines with that consideration in mind. It seems clear, therefore, that no question as to its constitutionality can be raised on that score.

Another question of interest is foreshadowed by the threat of the severance of diplomatic relations between the United States and Russia by reason of the recent protest by the United States that Russia was violating its undertaking, given when recognition was extended in November, 1933, with respect to non-interference in the internal affairs of the United States. Russia, at this writing, has repudiated this charge as unfounded, but obviously there is a serious difference of opinion about that, and the severance of diplomatic relations is a possibility. Without attempting to forecast the outcome of this diplomatic dispute, the possibility of the termination of diplomatic relations with Russia raises the question of what effect that action would have on this agreement.

If it were an agreement under the Foreign Trade Agreements Act of 1934, the President's right to terminate it would be unquestioned. But it is not such an agreement, and, furthermore, by its terms it is to continue for twelve months certain after its date and that situation raises some nice questions of international law.

CHANDLER P. ANDERSON

#### CONCERNING A RUSSIAN PLEDGE

Exchanges of diplomatic notes between the Governments of the United States and Russia in August, 1935, pertaining to the conditions on which American recognition of the Soviet régime was yielded in 1933, and the obligations of Russia thereunder, have raised a question of great importance, of which the amicable solution, from an American point of view, presents difficulties.

On August 25, 1935,<sup>1</sup> the American Government called the attention of the Acting People's Commissar for Foreign Affairs at Moscow "to the activities, involving interference in the internal affairs of the United States, which have taken place on the territory of Soviet Socialist Republics in connection with the VII All-World Congress of the Communist International," and accordingly lodged "a most emphatic protest against this flagrant violation of the pledge given by the Government of the Union of Soviet Socialist Republics

<sup>1</sup> Department of State Press Release, Aug. 25, 1935.

on November 16, 1933, with respect to the internal affairs of the United States."<sup>2</sup> It was declared that in view of the fact that the aim and activity of an organization such as the Congress of the Communist International, functioning on the territory of the Union of Soviet Socialist Republics, could not be unknown to the government thereof, it did not seem necessary to present material to show the aim of that congress with respect to the political or social order of the United States, or to quote from the published proceedings of that congress to show its activity relative to the internal affairs of the United States evidenced in the discussion at the congress of the policies and activities of the communist organization in the United States, and the determination and formulation by the congress of policies to be carried out in the United States by the communist party therein.<sup>3</sup> Declaring that the American people resented most strongly interference by foreign countries in their internal affairs, regardless of the nature or probable result of such interference, the Government of the United States, it was said, con-

<sup>2</sup> The pledge referred to was embraced in a communication addressed by Mr. Litvinoff, People's Commissar for Foreign Affairs, to President Roosevelt, in the following terms:

"I have the honor to inform you that coincident with the establishment of diplomatic relations between our two Governments it will be the fixed policy of the Government of the Union of Soviet Socialist Republics:

"1. To respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States, its territories or possessions.

"2. To refrain, and to restrain all persons in government service and all organizations of the Government or under its direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim, the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.

"3. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which makes claim to be the Government of, or makes attempt upon the territorial integrity of the United States, its territories or possessions; not to form, subsidize, support or permit on its territory military organizations or groups having the aim of armed struggle against the United States, its territories or possessions, and to prevent any recruiting on behalf of such organizations and groups.

"4. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions."

<sup>3</sup> "Nor does it appear necessary," it was said, "to list the names of representatives or officials of the communist organization in the United States who were active at the above mentioned Congress and whose admission into the territory of the Union of Soviet Socialist Republics, was, of course, known to the Government of the Union of Soviet Socialist Republics."

sidered the strict fulfillment of the pledge of non-interference "an essential prerequisite to the maintenance of normal and friendly relations between the United States and the Union of Soviet Socialist Republics"; and it was added that the most serious consequences were anticipated if the latter was unwilling or unable to take appropriate measures to prevent further acts in disregard of the solemn pledge given by it.

On August 27, 1935, the Acting People's Commissar for Foreign Affairs made response.<sup>4</sup> He appeared to emphasize three points: first, that his government had always regarded, and still regarded with the greatest respect, all obligations which it had taken upon itself "including naturally the mutual obligation concerning non-interference in internal affairs" provided for in the exchange of notes of November 16, 1933;<sup>5</sup> secondly, he stated that there were contained "no facts of any kind" in the American note of August 25, "which could be considered as a violation on the part of the Soviet Government of its obligations"; thirdly, he declared:

On the other hand it is certainly not new to the Government of the United States that the Government of the Union of Soviet Socialist Republics cannot take upon itself and has not taken upon itself obligations of any kind with regard to the Communist International.

Hence the assertion concerning the violation by the Government of the Union of Soviet Socialist Republics of the obligations contained in the note of November 16, 1933, does not emanate from obligations accepted by both sides in consequence of which I cannot accept your protest and am obliged to decline it.

On August 31, 1935, Secretary Hull made rejoinder.<sup>6</sup> He said that the Russian note raised the issue whether the Soviet Government, "in disregard of an express agreement entered into at the time of recognition in 1933," would "permit organizations or groups operating on its territory to plan and direct movements contemplating the overthrow of the political or social order of the United States." He declared that for sixteen years the American Government had withheld recognition—as had many other governments—mainly for the reason that the Soviet Government had failed to respect the right of the United States to maintain its own political and social order without interference by organizations conducting in or from Soviet territory activities directed against American institutions.<sup>7</sup>

<sup>4</sup> Dept. of State Press Release, Aug. 27, 1935.

<sup>5</sup> He added in this connection: "The Government of the Union of Soviet Socialist Republics sincerely sharing the opinion of the Government of the United States of America that strict mutual non-interference in internal affairs is an essential prerequisite for the maintenance of friendly relations between our countries and steadfastly carrying out this policy in practice declares that it has as its aim the further development of friendly collaboration between the Union of Soviet Socialist Republics and the United States of America responding to the interests of the people of the Soviet Union and the United States of America and possessing such great importance for the cause of universal peace."

<sup>6</sup> Dept. of State Press Release, Aug. 31, 1935.

<sup>7</sup> See Dept. of State Press Releases of Aug. 10 and Aug. 18, 1920. Declared Secretary

He said that after various stipulations in writing had first been carefully drafted and agreed upon by representatives of the two governments, recognition was accorded by his government in November, 1933. He further stated that the essence of the Soviet pledge in relation to non-interference in the internal affairs of the United States was "the obligation assumed by the Soviet Government not to permit persons or groups on its territory to engage in efforts or movements directed towards the overthrow of our institutions"; and he pointed out that the fourth paragraph of Mr. Litvinoff's letter to the President of November 16, 1933, irrefutably covered activities of the Communist International which was then, and still remained, the outstanding world communist organization, with headquarters at Moscow. The Secretary proceeded to draw logical, if stern conclusions. He said:

In its reply of August 27, 1935, to this Government's note of August 25, 1935, the Soviet Government almost in so many words repudiates the pledge which it gave at the time of recognition that "it will be the fixed policy of the Government of the Union of Soviet Socialist Republics . . . not to permit . . . and to prevent" the very activities against which this Government has complained and protested. Not for a moment denying or questioning the fact of Communist International activities on Soviet territory involving interference in the internal affairs of the United States, the Soviet Government denies having made any promise "not to permit . . . and to prevent" such activities of that organization on Soviet territory, asserting that it "has not taken upon itself obligations of any kind with regard to the Communist International." That the language of the pledge, as set out above, is absolutely clear and in no way ambiguous and that there has been a clean-cut disregard and disavowal of the pledge by the Soviet Government is obvious.

He added, by way of summary, that in view of the plain language of the Soviet pledge, it was not possible for the Soviet Government to disclaim its obligation to prevent activities on its territory directed towards overthrowing the political or social order in the United States; and also that that government did not, and could not disclaim responsibility on the ground of inability to carry out the pledge, for its authority within its territorial limits was supreme, and its power to control the acts and utterances of organizations and individuals within those limits was absolute. The Secretary forebore to utter any threat as to the consequences to be anticipated from further breaches of the Soviet pledge manifested in a continued policy of permitting activities on Russian soil involving interference in the internal affairs of the

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Hughes, in the course of a communication to Mr. Samuel Gompers, President of the American Federation of Labor, July 19, 1923: "What is most serious is that there is conclusive evidence that those in control at Moscow have not given up their original purpose of destroying existing governments wherever they can do so throughout the world. Their efforts in this direction have recently been lessened in intensity only by the reduction of the cash resources at their disposal. You are well aware of the experiences of the American Federation of Labor in this aspect of the situation which must be kept constantly in view."

United States; but he did declare that such action would<sup>3</sup> seriously impair the "friendly and official relations between the two countries."

The United States has a strong case against Russia, and its Secretary of State has made the best of it. It is a tragic thing that the government of a friendly state in any continent should, through a single diplomatic note, shatter the confidence of another in its high purposes and good faith. To the American people the matter is more serious than may be apparent from the mere fact that a foreign pledge has been repudiated. Secretary Hull's notes bring home to his countrymen a grim realization of the fact that on Russian soil, under Soviet control and association, organized effort is being made to interfere with the domestic affairs of the United States, which there is reason to believe is still aimed at "the destruction of the free institutions which we have laboriously built up."<sup>8</sup>

It may be that regardless of the thought expressed in its note of August 27, 1935, the Soviet Government may see the wisdom of exercising the preventive power which it doubtless possesses to check the injury to which the United States is being subjected. On the other hand, the Soviet denial of an obligation of responsibility for the doings of the Communist International is so definite and far-reaching in its consequences, that American thought must engage itself in consideration of the question how the United States may fairly and effectively protect itself against an essentially foreign-born and foreign-propagated evil. Our government is familiar enough with modes of preventing by its own efforts the introduction into American territory of articles that are harmful to man, or beast or plant. How may the United States effectively safeguard itself against highly organized efforts persistently emanating from a particular place in a single country to break down the bases of American institutions? If there is sympathy and understanding and association between the government of that country and those engaged in the work of destruction abroad, it may be difficult, at least by means of a bare agreement, to wean that government from its associates; or to cause it to check vigorously their sinister activities. The American experience with the Russian pledge of 1933 is illustrative. By some process there needs to be brought home to the state charged with aiding, or abetting, or conniving at the acts complained of, a conviction that its own interests demand a different course. It may be extremely difficult for the United States to convince the Soviet Government that Russian interests are thwarted or impaired by giving the Communist International free rein to endeavor to interfere with American institutions. Yet there are means of making the ways of the Russian transgressor harder than they have been, or are today, and these are not outside the reach of the United States.

Some deserve attention. In point of theory, arbitration might be regarded as a means whereby the United States might obtain by judicial process not only acknowledgment of the breach of the Russian pledge, but also an award

<sup>8</sup> Note from Secretary Hughes to Mr. Samuel Gompers, July 19, 1923.

in the nature of an injunction designed to cause the Soviet Government to cease to permit its territory to be the base of operations of the Communist International against American institutions. It is highly improbable, however, that the states at variance would agree to have recourse to such procedure.<sup>9</sup>

The withdrawal of the American recognition of the Soviet régime as the Government of Russia would be open to technical difficulties. While that recognition was conditional, and one of the conditions—that contained in the fourth paragraph of the Soviet note of November 16, 1933—has been violated if not repudiated, that circumstance would hardly justify the United States in taking a stand that denied by implication that the Soviet régime was at the present time to be regarded as the Government of Russia. In a word, the imposing of a variety of terms as a condition to the recognition of a new government as such, and the securing of pledges that they will be duly fulfilled, does not necessarily enable the recognizing state, in the event of non-fulfillment, to re-create the exact situation or relationship that existed prior to the according of recognition. Yet there are other ways in which the United States may safeguard itself. Without marshaling the various means of self-help to which recourse, whether advantageously or otherwise, might be had, without violation of international law, attention is called to the efficacy of one. By the severance of diplomatic relations with Russia, the United States could make clear to the Soviet mind the determination of the American people to frustrate foreign interference with their domestic affairs. Such action would mark no cessation of recognition of the Soviet régime as the Government of Russia. But it would proclaim solemnly to all the world the American sense of outrage in a condition permitted to prevail on Russian soil that was subversive of the safety of the United States. It would not be relished at Moscow; it would put other countries on their guard against like interference; it would injure the prestige of a state that, like others, is not without a desire to enhance the esteem in which it is held beyond its own borders.

It is not suggested that the United States, as a notable advocate of the amicable adjustment of international differences should ever have recourse to non-amicable measures save for ample cause, and when no others offer promise of redress or relief. As an initiator of the Pact of Paris of August 27, 1928, it has formally announced its normal stand in that regard from which it will not deviate. It must ever be recalled, however, that according to

<sup>9</sup> The United States might be unwilling to permit the fact of the repudiation of the Soviet pledge to assume the form of a question for adjudication, and it might doubt the efficacy of an award purporting to obligate Russia to curb the activities of the Communist International directed against the United States. Russia, on its side, might be expected to be unwilling to permit the relationship between the Soviet Government and the Communist International to be aired in an international forum and still less to run the danger of having an arbitral court hand down a denunciatory decree shot through with formal orders obliging it to take disagreeable steps to check the activities of that body.

Secretary Kellogg, no party to the Pact was to be deemed to relinquish its inherent rights of self-defense, or to put any obligation of amicable adjustment in front of them. The admirable notes of Secretary Hull to the Soviet Government reveal his effort to secure by diplomacy respect for a pledge of utmost concern to his country; and if that effort proves successful it will be in part attributable to the candor with which he has pointed to the character of the Russian treatment of it. Yet the very seriousness of his arraignment of the Soviet stand as reflected in its note of August 27, as well as the grave conditions which he depicts, point to the pressing, if not extraordinary need of safeguarding his country against an insidious enemy finding a hospitable base of operations on Russian soil. At this writing it is not known whether the Soviet Government is as yet imbued with a desire, even if not with a sense of duty, to relieve a traditional friend of its country of an unwelcome task. If it is not, the Government and people of the United States are not likely to be deterred from taxing their whole resourcefulness to protect their institutions from any form of Russian interference. No pecuniary gains or losses will be allowed to weigh in the balance. There will be no selling of the American birthright for a mess of pottage.

CHARLES CHENEY HYDE

#### RESPECT FOR NATIONAL FLAG

There is naturally a sensitiveness as to the treatment of a national flag. Domestic legislation has in recent years protected the national flag from use or display in a manner that might be regarded as disrespectful. The respect for their banners and standards demanded and enforced by early leaders was later demanded for the banners of states when states supplanted these leaders. States have often formally adopted flags and usually prescribe for their use. National flags are raised and lowered on official stations with defined ceremony. Salutes are given in honor of the flag on public vessels. International conventions forbid the use of "national, provincial, or municipal flags or coats of arms" as trade marks (39 Stat. 1675). National courts protect flags from such use (*Halter v. Nebraska*, 205 U. S. 34).

Flags are necessary and convenient for identification of the nationality of vessels and at times for the determination of their movements and character. It is particularly desirable that vessels in foreign jurisdictional waters display their national flags in order that their rights may be respected. This may be of special importance in time of war, when relations may be strained or when mistakes or misunderstandings may easily arise.

Any disrespect to a foreign national flag is regrettable, but the degree of responsibility of the state in which the case arises may vary with the circumstances. The passing of a sovereign through a foreign state often involves most elaborate and detailed preparations, but the passage of a foreign merchant vessel through the marginal waters of a state might be even unknown to the state and involve no responsibility. When a vessel of war or

other vessel engaged in public service enters or proposes to enter a foreign port, the procedure is usually well established and carefully followed. Merchant vessels are regularly entering foreign ports for the mutual advantages of commerce, and by laws, some of which had their origin in prehistoric times, their rights are recognized. The so-called rights of the flag of the merchant vessel are relatively late in origin, and the Barcelona Declaration, April 20, 1921, authorizes recognition of flags flown even by vessels of states having no seacoast.

It is now generally admitted that flags of merchant vessels should, for mutual convenience and to avoid friction, be treated with respect. The degree of respect would imply reasonable care on the part of the two states. This would involve due authorization on the part of the state of origin and reasonable protection in the state of reception.

An incident on the German steamship *Bremen*, July 26, 1935, became a matter of State Department consideration. The *chargé d'affaires ad interim* of Germany reported that "the German flag flying from the bow of the steamship was violently torn off by demonstrators" and that he was instructed by his government

to make most emphatic protest against this serious insult to the German national emblem, and I venture to express the expectation that everything will be done on the part of the American authorities charged with the prosecution of criminal offenses in order that the guilty persons may be duly punished.

The reply by the Department showed that the local authorities of New York City had taken special precautions in anticipation of the demonstration and that there was no evidence of neglect on their part. The Department at the same time through the Under Secretary said on August 1, 1935:

It is unfortunate that, in spite of the sincere efforts of the police to prevent any disorder whatever, the German national emblem should, during the disturbance which took place, not have received that respect to which it is entitled.

GEORGE GRAFTON WILSON

#### NEUTRALITY AND RESPONSIBILITY

The Neutrality Act passed by Congress on August 24 marks a fundamental departure both from the policy of the United States in respect to the obligations of a neutral state and from the regular practice of neutral states prior to the adoption of the Covenant of the League of Nations. That the position taken by Congress is fully reconcilable with the traditional law of neutrality would seem to be beyond question. For it is no more than the renunciation of rights which have long been a matter of contention between belligerents and neutrals; and on the other hand it cannot be said to conflict with any duty on the part of the neutral to assert rights which exist primarily for his benefit. The fact that the renunciation of these rights may

in the event prove to be more detrimental to one belligerent than to another lies outside the range of valid claims.

But while consistent with the traditional law of neutrality the new legislation raises a number of questions of concern to international lawyers. In the first place it has no relation whatever to the prevention of war. It evades that problem altogether. It assumes the possibility of another war and seeks only to prevent certain situations from arising which might tend to lead the United States to take part in it. Its purpose is therefore limited to the protection of the immediate interests of the United States in the event that a conflict should arise abroad. The act thus reaffirms indirectly the refusal of the United States to accept the principle of the collective responsibility of all nations for the maintenance of peace. It acquiesces in the old law that the territorial integrity of a state is a matter for its own defense, or at any rate a concern of other members of the international community if any of them should wish to act on their own account. It is wholly indifferent to the larger issues of an economic character that lie behind the Italian-Ethiopian controversy. Whether the action of Congress be wise or unwise under the circumstances, such is its primary character as a matter of law.

In the second place, the new Neutrality Act carries with it an implied abandonment of the Pact of Paris. In an address of August 8, 1932, Secretary Stimson asserted that while "under the former concepts of international law" states not parties to a conflict could only exercise "a strict neutrality alike towards the injured and the aggressor, . . . now under the covenants of the Briand-Kellogg Pact such a conflict becomes of concern to everybody connected with the Pact." The new legislation, without directly stating that a future conflict would not lead to affirmative action by the United States for the preservation of peace, clearly suggests such an attitude by emphasizing the fact that what is being done is being done on the basis of the old law of neutrality. The Act does not, however, commit the United States to oppose sanctions that might be taken by other signatories of the Pact if those sanctions took the form of preventing the export of arms and ammunition to the aggressor state. For the mere fact that the ban imposed by the United States applies also to the victim of the attack would be of no practical consequence if it could obtain its supplies from other states. The abandonment of the Kellogg Pact lies in the implied refusal of the United States to make any distinction between the belligerents, between the state which resorts to war "as an instrument of national policy" and the state which seeks "peaceful means of settlement." It has never been clear what the preamble of the Pact means when it says that a state which should thereafter seek to promote its national interests by resort to war should be "denied the benefits furnished by this Treaty." But the whole spirit of the treaty indicates that after its conclusion the United States as a signatory would not be an indifferent spectator in the event of a violation of the treaty. Such indifference would seem to be a natural inference from the new Neutrality Act.

The most serious feature of the Neutrality Act is, however, the fact that it goes but half-way towards its goal. It makes unlawful the export of arms, ammunition and implements of war from the United States to a belligerent; but it makes no provision for the prohibition of loans and credits to a belligerent, or for the export of foodstuffs, cotton, motor cars, and other conditional or absolute contraband. Quite clearly, in passing the new law Congress had in mind not merely the impending conflict between Italy and Ethiopia, but the possibility of another general European war. In that case, if the experience of the World War means anything, it would be the interference by belligerents with American trade in articles not covered by the new law that might involve us in controversies with the belligerents. Congress has therefore reaffirmed obsolete principles of law without securing for the country the protection that was most needed.

The limitations of the new Act do not, however, mean that if the members of the League of Nations should attempt to apply general economic sanctions against an aggressor state, the United States would not coöperate. The new law simply does not go that far. It permits shipments from American ports of all articles except arms, ammunition and implements of war, and further legislation would be needed to broaden the prohibition so as not to defeat a general boycott if one were declared. Nor does the new law preclude consultation with other nations in the event of a threatened violation of the Pact. If after abandoning the principles of the Pact the Government of the United States should choose to recognize the obligation of consultation which Secretary Stimson found to be implied in the Pact, or should choose to consult without recognizing an obligation to do so, it is still free to follow such a course, whatever attitude it might subsequently adopt in the event that consultation did not succeed in averting war.

It would seem clear that the Neutrality Act does not embody any clearly-defined policy on the part of the United States, but represents rather a stop-gap until the date of its expiration on February 29, 1936.

C. G. FENWICK

#### THE NEW NEUTRALITY LEGISLATION<sup>1</sup>

After much debate and as the result of several compromises, Congress passed Senate Joint Resolution No. 173 which was approved on August 31, 1935. The resolution combines certain provisions found in a number of different bills which had been introduced during the session. Its first section, dealing with arms embargoes, is temporary, ceasing to be effective on February 29, 1936. Its second section creates a National Munitions Control Board to function continuously for the licensing of the import and export of arms and munitions. Its four other substantive sections lay down rules regulating the conduct of persons during periods in which the United States is neutral.

<sup>1</sup>Text of the Act in Public Res. No. 67, Senate Rep. No. 1419, 74th Cong., 1st sess. and Department of State, *Treaty Information Bulletin* No. 71, p. 7.

Between January 10 and August 17, 1935, five bills were introduced in the Senate and ten in the House dealing with the general subject covered by this Act.<sup>2</sup> Of these bills, two dealt solely with the prohibition of loans and credits to belligerents when the United States is neutral, and three others included such prohibition with other provisions. This subject is not covered in the final Act. Eight bills dealt with arms embargoes; of these, only Mr. McReynolds' H. J. Res. 386 would have given the President authority to discriminate between belligerents in applying such an embargo. This discretionary authority was desired by the administration. If it had been granted, the President would have been free, if he so desired and if occasion arose, to assist in the application of sanctions imposed by the League of Nations. The action of Congress in making the embargo applicable to both or to all belligerents, reiterates the attitude previously indicated in the Senate on this subject,<sup>3</sup> but the temporary nature of this section shows that the debate on the general policy involved is not settled but awaits the next session of Congress. The temporary compromise was designed to afford some applicable rule in case war broke out between Italy and Ethiopia. It was the final result of long discussion between the Senate Committee on Foreign Relations and officials of the Department of State.

Section 1 of the Act as passed, wisely avoids the attempts made in some of the bills to catalogue arms, ammunition and implements of war, leaving it to the President to make an enumeration. It also leaves to the President the choice of the time at which his proclamation shall issue, since this may be either "upon the outbreak or during the progress of war." It leaves him further discretion as to extending the embargo to states which have become involved in the war after the date of his proclamation. It is conceivable that he might, for example, proclaim an embargo upon the outbreak of war between Italy and Ethiopia and refrain from extending it to other members of the League who might subsequently become involved through the application of sanctions under Article 16, or otherwise. This Section 1 is also wisely framed

<sup>2</sup> S. J. Res. 20, introduced by Mr. King, Jan. 10; S. J. Res. 99, by Mr. Nye and Mr. Clark on April 9; S. J. Res. 100 by the same on same date; S. J. Res. 120 by the same on May 7; S. 2998 by Messrs. Pope, Nye, Bone, George, and Clark on May 13; H. J. Res. 239 by Mr. Maverick on April 6; H. J. Res. 259 by the same on April 24; H. J. Res. 266 by Mr. Fish on April 29; H. J. Res. 267 by the same on same date; H. R. 2058 by Mr. Knutson on Jan. 3; H. R. 7125 by Mr. Kloebe on March 29; H. R. 7344 by Mr. Burdick on April 8; H. R. 8788 by Mr. McReynolds on July 9; H. R. 8979 by Mr. Tinkham on July 29; H. J. Res. 386 by Mr. McReynolds on August 17.

<sup>3</sup> See Woolsey, "The Burton Resolution on trade in munitions of war," this JOURNAL, Vol. 22 (1928), p. 611; Borchard, "The arms embargo and neutrality," *ibid.*, Vol. 27 (1933), p. 293; J. B. Moore, "The New Isolation," *ibid.*, p. 622; Fenwick, "The arms embargo against Bolivia and Paraguay," *ibid.*, Vol. 28 (1934), p. 536. See also Briggs and Buell, "American Neutrality in a Future War," Foreign Policy Reports, April 10, 1935, pp. 31-32.

in that exports are prohibited not only to the belligerent states, but also "to any neutral port for trans-shipment to, or for the use of, a belligerent country." It should be realized, however, that this throws upon the neutral government of the United States the difficult task of discovering the cases of continuous voyage and ultimate destination which have troubled prize courts for more than a century and a half. At the same time, it does not attempt to settle the crucial issue of the definition of contraband, although the President would have the power, if he chose to exercise it, of taking as a test of "implements of war" the categories contained in belligerent contraband lists. There is nothing novel in a neutral assuming the duty not imposed by international law, of prohibiting its nationals from engaging in the contraband trade.<sup>4</sup> It remains to be seen whether the United States is prepared to relinquish its opposition to the indefinite extension of contraband lists and to the attempted abolition of the distinction between absolute and conditional contraband.

Section 3 of the Act reinforces the penalties provided in section 1, by making it unlawful for American vessels to carry arms, etc., in violation of the proclamation which the President must issue. Since the proclamations under section 1 become ineffective on February 29, 1936, section 3 is also ineffective after that date. This section 3 is designed to eliminate a possible cause of involvement of the United States through the capture or sinking of American vessels. To be fully effective in case of war, it would be necessary for the Government of the United States to come to an agreement with the belligerents upon some distinctive marking which would show that American vessels at sea were not evading the statute and were therefore not carrying arms, etc. Again the question of contraband comes under consideration as well as the law of blockade.

Section 4 extends the authority and duty of the President with respect to vessels whether domestic or foreign, which are suspected of being about to carry supplies to a belligerent warship, supply ship or tender. The President may require such vessel to give bond conditioned on the non-delivery of supplies to any such belligerent ship. If it be found that a vessel has violated its bond, the President may thereafter forbid its departure from a port of the United States "during the duration of the war." This section is applicable when there is not sufficient evidence to justify the original detention of the vessel under the provisions of the Act of June 15, 1917. This section might prove of value in enabling the United States to fulfill its present obligations as a neutral regarding the existence in the United States of a belligerent base of supplies. The efficacy in particular situations may be doubted. It should be noted further that the President's action under this section depends upon his judgment that it will "serve to maintain peace between the United States and foreign nations, or to protect the commercial

<sup>4</sup> Woolsey, "The Burton Resolution on trade in munitions of war," this JOURNAL, Vol. 22 (1928), p. 611.

interests of the United States and its citizens, or to promote the security of the United States."

Upon the basis of a like judgment, under section 5, the President may regulate the entry into and the departure from American waters of "submarines of a foreign nation"; this provision is not limited to belligerent submarines. Again under the same conditions, with an added specification regarding the "protection of the lives of citizens of the United States," the President shall, under section 6, proclaim that "no citizen of the United States shall travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President shall prescribe." Exception is made for citizens commencing a voyage before the date of the President's proclamation and having no opportunity to discontinue their voyages and for citizens returning to the United States from a foreign country within ninety days of the date of the proclamation. This section, or its counterpart, is found in a number of the other bills and reflects a determination not to permit the United States to become involved through another tragedy like that of the *Lusitania*. It may require some popular education to overcome the probable attitude of the jingoes who might insist on revenge if American lives were lost by submarine sinkings of merchant vessels even despite the statutory warning; many stranger things have happened in war-time.

Section 2 of the Act was originally found in separate bills and its inclusion in this Act is due to legislative exigencies rather than to any close or logical relationship. It is partly the result of the investigations of the Nye Committee and is a first step along the line of enabling the United States to act effectively in the control of the munitions traffic, particularly with reference to international conventions for its regulation and restriction. The National Munitions Control Board which is established, is composed of the Secretary of State as chairman, and the Secretaries of the Treasury, War, the Navy and Commerce. All persons dealing in arms, munitions or implements of war must register with the Secretary of State every five years. No export or import of such goods is permitted except under license, but licenses can not be refused to registered persons unless the export or import in question would violate a treaty or statute of the United States. Purchases on behalf of the United States may be made only from registered persons. The President, on the advice of the Board, is authorized to proclaim a list of arms, munitions and implements of war for the purposes of this section. Apparently such list need not coincide with a list proclaimed under Article 1 for purposes of the embargoes. The Board is to make an annual report to Congress, giving full information regarding registration and licenses.

As a piece of neutrality legislation, this Act is haphazard and incomplete. The most regrettable feature of the present situation is the fact that the Department of State and the Congress before beginning their recent studies of the problem, allowed so many years to pass without commencing the long and

detailed consideration which is essential to any real solution. The need for further study is recognized in the statement issued by the President upon signing the bill: <sup>5</sup>

In several aspects further careful consideration of neutrality needs is most desirable, and there can well be an expansion to include provisions dealing with other important aspects of our neutrality policy which have not been dealt with in this temporary measure.

The President also properly noted that the legislation was a response to the expressed desire of the American people to avoid being drawn into another war. The difficulties of that problem are apparent to any one who has read Mr. Walter Millis's *The Road to War*, whether or not he agrees with all of the statements and points of view in that important book. The Harvard Research in International Law has determined to devote the next three years to a study of the neutrality problem. No one can tell whether so long a study as is necessary can take place before the necessity for further legislation is upon us. Aside from much complicated technical detail, for which some of the unpassed bills offer interesting solutions, there is the broad question of the fundamental policy which the United States is to pursue. The President in his statement suggests that "the wholly inflexible provisions of Section I of this act might have exactly the opposite effect from that which was intended. In other words, the inflexible provisions might drag us into war instead of keeping us out." This suggests further consideration of a policy of coöperation in the imposition of sanctions. Such coöperation implies that there is somebody to coöperate with; presumably such body would be the League of Nations. An impartial embargo such as this Act calls for temporarily, would not seriously hinder the League in imposing certain economic sanctions; it would constitute merely a negative attitude of non-assistance. It might constitute a hindrance if the League should attempt a total economic blockade and if the President should draw up a restricted list of munitions and implements of war. If the members of the League are not able to reach unanimous or substantial agreement on applying sanctions, the question remains whether the United States would be inclined to join with a smaller group in taking sides. If this possibility be excluded, there remains the further question whether neutrality itself, may not, through the coöperative action of all neutrals, serve to shorten the duration of war or to limit its scope.

At present the Act seems to be hailed by the isolationists as a victory for their cause and it is correspondingly disappointing to the international co-operationists and to those members of Congress who wished to go much further in framing measures, within the scope of neutrality, designed to keep the United States from becoming involved through the traditional quarrels over neutral rights. War between Italy and Ethiopia alone will not seriously test the neutrality of the United States unless members of the League resort

<sup>5</sup> Press Releases, Department of State, August 31, 1935, p. 162.

to sanctions. In this connection, it should be noted that the Act places upon the President the duty of determining when war exists; we may see more instances of "acts of war" without a state of war. For more than one reason it is to be hoped that this fragmentary legislation will be superseded before it is fully tested.<sup>6</sup>

PHILIP C. JESSUP

#### INTERNATIONAL REVOLUTION

In our preoccupation concerning specific disputes between nations and particular problems affecting the law of nations, we are in danger of ignoring the great social movements of a tidal or seismic nature which may so profoundly alter the nature of international society as to affect even the *raison d'être* of international law itself. Questions of national prestige, boundaries, territorial ambitions and aggression, or even of world organization, may become of lesser significance in the face of a "new world order." If the basic interests of men are changed, it necessarily follows that the basic law to protect those interests must change. An international law created when sovereigns and sovereign rights were dominant cannot remain unchanged when class interests become predominant over national sovereign interests. It would seem essential occasionally to reflect on the new social and economic principles which are in process of emergence at this time of general unrest and the apparent disintegration of civilization itself.

Mexico furnishes an excellent object lesson for our purpose. A genuine social upheaval, a progressive evolution is going on both because of, and in spite of, the successive typical revolutions which have occurred since the historically significant overthrow of the régime of Porfirio Diaz in 1910. We now have sufficient perspective to see that the Revolution of 1910 marked the end of the era of the Spanish Conquest and the emancipation of the Mexican Indian. Without conscious formulation of the aims of this epochal revolution, or the ability to articulate its ideals, the people of Mexico are feeling their way from mediaevalism to a new social order which no one can adequately comprehend or foretell.

The Mexican Indian is rapidly becoming self-conscious and definitely aware of the nature of the wrongs he has suffered during the centuries following the arrival of Cortez. His first concern, naturally, has been to escape from the abject state of virtual slavery whereby his labor was controlled through the nefarious system of hopeless indebtedness to his employer. The indignity and injustice of this archaic system are only too apparent. His next concern has been to recover possession of the communal lands which gradually were appropriated and distributed among the big landowners. His desire would seem to be in the direction of private ownership rather than of a return

<sup>6</sup> The President issued a proclamation under Section 1 of the Act on Oct. 5, 1935 (text in *New York Times*, Oct. 6); and a further proclamation on the same day under Section 6 of the Act (*ibid.*, Oct. 7).

to the communal system. And thirdly, the Mexican laborer is beginning to recognize that he has never been paid what would be fairly considered a living wage and is consequently convinced of the value of labor organization to assist him in his fight for economic independence.

The rectification of these three injustices—of slavery, of the confiscation of lands, and the payment of insufficient wages—inevitably involves fresh injustices to property owners and investors, and obligations of a contractual nature, which led investors and particularly many foreign investors to advance the money needed in the development of various agricultural and industrial undertakings, have virtually been repudiated. American investors in the oil industry have especially suffered by reason of Mexican legislation to restore to the Mexican people what they consider to be their rightful patrimony. Without seeking to palliate these arbitrary acts of injustice to the landowners and investors we cannot be blind, however, to the fact that there exists a vague conviction that rights which originated in accordance with a brutal social and economic philosophy cannot decently be considered of a permanent nature. The liquidation of centuries of injustice may not be expected to be accomplished with ease or in a way gratifying to the privileged classes. Vested interests can never be readily reconciled to the loss of any of their privileges.

It is inevitable, of course, that reforms of so vital a nature can only be brought about in a thorough and effective manner by a process of general popular education. This process of the education of masses of people long in sodden ignorance and having a shattered morale most unfortunately must entail lamentable results. Desires and demands are created which obviously can only be qualified as radical when viewed from the vantage point of a conservative and reactionary state of society and mental outlook. Once the giant is awake and conscious of his strength he is bound to strike out against anything which he regards as inimical to his rights and aspirations. It is difficult for a giant with a child-mind to be considerate and just. Former benefactors and friends are quite as likely to suffer from his violence as his avowed enemies. Nothing is so harmful in its results as a blind sense of injustice when stimulated by the new wine of radical education. In Mexico, whether rightly or not, the common laborer has been led to view the Church as the friend of reaction and of the vested interests. He is not aware, apparently, of any marked sympathy of the Church with his aspirations for a new social order. His education has been taking the form of a new intolerance and a new dogmatism which would enslave the human mind quite as disastrously as older forms of intolerance and dogmatism.

The salient aspect of the Mexican revolution, as well as of the social revolution which is occurring throughout the world, is a growing class-consciousness which cuts right across political organizations and all social institutions. This can only result in a general demoralization and a gradual disintegration of accepted institutions and ideals. The state as a necessary and desirable

organism for the protection of the interests of all members of society ceases in large measure to maintain its *raison d'être* when the mass of the people become imbued with the idea that there can be but one class. And this class-consciousness, this class hatred, naturally takes on a portentous character when it sweeps across natural frontiers and exalts the rights of the workers of the world as against all other rights.

The most marked consequence of world unrest and this spirit of social revolution would seem to consist in an extraordinary lessening of respect for all authority, whether in politics, economics, social institutions, education, the Church, and the home itself. Statesmen in countries where democracy still holds sway no longer speak with convincing authority, either in internal affairs or external relations. With the bewildering exception of a few fascist states, there is generally evident a disquieting mass movement of class-conscious people in opposition to what has heretofore been regarded as strictly national interests. We are now in an age, apparently, when governments no longer talk to governments, nor states to states, but when peoples, or rather masses of peoples, speak and appeal directly to each other. This can only mean the gradual destruction of the very foundations of international law in the sense of a law prevailing between nations. The tendency now is plainly to lay emphasis on the dignity and the interests of the individual and of the class to which he belongs rather than to national interests as a whole. Law is being regarded very widely not as a logical evolution for the protection of rightful interests laboriously created and conscientiously respected, but rather as a temporary instrument for the accomplishment of arbitrary ends. We can no longer say with assurance that the object of civil society is actually "a government of law and not of men."

All this is vividly epitomized in the case of the Russian Soviet Union which has succeeded not merely in putting radical ideas into effect within its own boundaries, but in serving as a loudspeaker to broadcast throughout the world the inchoate convictions and aspirations of millions of workers in many lands who are rapidly becoming more class-conscious than nationally minded.

When a nation of one hundred and sixty millions takes possession of the land and of all industry, engages in long-term national economic planning, owns ships, engages actively in international trade, converting diplomats into commercial agents and political missionaries, the effects on international interests and upon the law which must govern those interests cannot fail to be far-reaching. All accepted theories of government, economics, and social relations are bound to be rudely challenged. Whether we are sympathetic or not to this international revolution, we must candidly acknowledge that the world is in the throes of a social upheaval that defies either analysis or control. It may well be that an entirely new basis of international society is being laid in place of nationalism which may require a new kind of law to regulate the relations of the diverse peoples of the world. In that eventuality, we would be better occupied as students of international relations in

seeking to accommodate existing rules of international law to this new world order than in attempting to codify these rules or to hold fast to a stereotyped system of law no longer applicable. The rule of *rebus sic stantibus* would seem to be susceptible to a much wider and profounder philosophical interpretation than we may have thought possible. It is surely imperative to revise our methods of analysis and exposition of the law of nations. Who knows whether a new *jus gentium* may not be in rapid process of evolution?

PHILIP MARSHALL BROWN

#### THE DEPORTATION OF ALIENS

In the closing hours of the first session of the Seventy-fourth Congress, the enactment of the bill to ameliorate the application of our laws relative to the deportation of undesirable aliens<sup>1</sup> was inevitably brushed aside to make way for legislation of more urgent necessity or greater political importance. This failure would have made it imperative for the Secretary of Labor to apply the existing regulations in all their rigidity and harshness and to deport a considerable number of deserving aliens, to the misery of the individuals concerned as well as to the shame of the government responsible for such inhumane action.

In order to prevent this injustice, Congress did well to adopt the following resolution:<sup>2</sup>

Whereas during the past two years the Department of Labor has stayed the deportation of some two thousand six hundred hardship cases of aliens technically subject to deportation whose deportation would involve the separation of many families, leaving approximately seven thousand dependent relatives here, of whom approximately five thousand are wives and minor children, pending consideration by Congress of certain proposed legislation; and

Whereas the House Committee on Immigration and Naturalization on June 18, 1934, unanimously adopted a resolution urging the continued stay of deportation in such cases pending such time as the Congress required for a further opportunity to study the problem; Therefore be it

*Resolved*, That in order that the Congress may have adequate time to consider the proposed legislation, the Commissioner of Immigration and Naturalization be requested to continue the stay of deportation until March 1, 1936, in the cases of aliens of good character, excepting those involving a question of moral turpitude, in which deportation would result in unusual hardship; and be it further

*Resolved*, That on or before January 15, 1936, the Commissioner submit to the Congress for its consideration a list of all cases, excepting those involving a question of moral turpitude, stayed up to and including December 31, 1935, and to submit a list of names of all cases, to-

<sup>1</sup> H. R. 8163 and S. 2969 "a bill to authorize the deportation of criminals, to guard against the separation from their families of aliens of the non-criminal classes, to provide for legalizing the residence in the United States to certain classes of aliens, and for other purposes."

<sup>2</sup> H. Res. 350, adopted Aug. 23, 1935.

gether with the full and complete file of each name and case, and all facts pertaining to same.

That Congress, harassed with major problems of legislation, was prevailed upon to take this action in the midst of the slaughter of many a meritorious measure was undoubtedly due to the vigilance and energy of Col. Daniel W. MacCormack, Commissioner of Immigration and Naturalization, who naturally stood aghast at the thought of finding himself compelled to deport so many innocent persons to the detriment of the true interests of his country and the real purpose of its laws. For who will be so bold as to proclaim that the laws of the United States would knowingly provide for the separation of a minor from his parents or deport the breadwinner and leave his dependents in want! No doubt the bill will be adopted substantially in the same form in the session which meets next January.

An important effect of the proposed legislation will be to make it possible to deport certain classes of criminals who now go free. Such are offenders against State narcotic laws. At present violators of Federal narcotic acts are deportable, but violators of State narcotic acts are not. When this bill has been adopted, any alien who has been convicted of a crime involving moral turpitude within five years of the institution of deportation proceedings against him may be deported. The existing law has several qualifications which permit criminals within the scope of its reasonable provisions to escape its application and remain. In cities, where corrupt politicians can influence the judges they help to elect, the existing regulations favor the alien criminal at the expense of the American citizenry. For example, the judge who sentences an alien may by a simple recommendation to the Secretary of Labor prevent deportation. In order to decide upon such cases and others, it is proposed to set up a quasi-judicial, interdepartmental committee with representatives from the Departments of Labor, State, and Justice. This would ensure a better application of the regulations and relieve the Secretary of Labor of an onerous and politically dangerous responsibility.

What could be more absurd than the present regulation which requires those who enter as students or temporary visitors to leave the country and re-enter before they will be permitted to remain permanently. This rule has been applied even to those non-quota aliens who marry an American. They must one and all depart for re-entry before they can become citizens or permanent residents. We need another poem of Evangeline to portray all the misery these inhumane regulations have caused.<sup>3</sup> The effect of the proposed legislation will not be to increase the sum total of our immigration—rather the contrary. It will moreover carry out what is certainly the spirit and intent of our laws and institutions—namely, to treat everyone under our control, be he citizen or alien, with justice and humanity.

ELLERY C. STOWELL

<sup>3</sup> Cf. Appendix I contained in a letter from the Commissioner of Immigration and Naturalization, dated May 29, 1935, and addressed to Senator Marcus A. Coolidge, Chairman of the Senate Committee on Immigration.

THE DENUNCIATION OF THE DISARMAMENT CLAUSES OF THE  
TREATY OF VERSAILLES

The action taken on March 16 by Chancellor Hitler in reestablishing compulsory military service in Germany and thus informally repudiating the disarmament clauses of the Treaty of Versailles is, it would appear, destined to take its place beside the action of Russia in 1870 as one of the famous "incidents" which mark the historical development of international law, if law can be said to be "developed" by its breach as well as by its observance. Under the caption of "*Clausula rebus eic stantibus*" one treatise on international law after another has cited the repudiation by Russia in 1870 of the provisions of the treaty of 1856 relating to the neutralization of the Black Sea and imposing a restriction upon Russia in respect to keeping armed vessels in that sea. When the Great Powers met in London at the close of the Franco-Prussian War they allowed Russia to have her way; but they administered a rebuke to her in the form of a declaration asserting that "it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement."

The denunciation of the disarmament provisions of the Treaty of Versailles was not based upon an "essential change of circumstances" but upon the alleged failure of the other parties to the treaty to live up to the obligations of disarmament assumed by them. That these obligations were vague as to scope and indeterminate as to time did not affect their fundamental character; and there would seem to be little doubt that they had not been carried out at the time Germany took action, whatever justification might be alleged on the part of the several Powers for their failure to do so. In this connection it is important to note that negotiations had been in progress for a number of years looking to the fulfillment of the obligations upon the other Powers to reduce their armaments. In consequence, the issue put forward by Germany of a prior breach of treaty by the other parties becomes a question whether the delays and postponements attending the negotiations were of such a character as to suggest an intention not to live up to the agreement.

In a memorandum addressed to the Council of the League of Nations, published on April 14, 1935, the French Government reviewed the course of these negotiations with the object of showing that they indicated a sincere intention on its part to live up to its obligations in spite of the difficulties with which the Disarmament Conference, which was in session at Geneva at the time of Germany's action, was confronted. The French note then proceeded to condemn in strong terms the unilateral denunciation of international engagements, pointing out that if it became general there would be no room for any other policy than that of force. The Council was called upon to meet the "threat to international order" by considering methods for

remedying the situation created by Germany's action and for preventing its recurrence.

At its meeting on April 17 the Council of the League adopted unanimously a resolution embodying the points outlined in the French memorandum. Denmark alone abstained from voting. The resolution, after condemning in general "any unilateral repudiation of international obligations," invited the governments that had approved the Anglo-French proposals of February 3 to continue negotiations for the attainment of the objects of those proposals. More specifically, the resolution pointed out that "the unilateral repudiation of international obligations may endanger the very existence of the League of Nations as an organization for maintaining peace and promoting security," and it declared that such repudiation should, when it bore a relation to engagements concerning the security of nations and the maintenance of the peace of Europe, "bring into play all appropriate measures on the part of the members of the League and within the framework of the Covenant." This statement of principle was followed by a recommendation that a committee be appointed to propose "measures to render the Covenant more effective in the organization of collective security, and to define the particular economic and financial measures which might be applied in the future should a State, whether a member of the League of Nations or not, endanger peace by unilateral repudiation of its international obligations."

In passing it is significant to observe that, in the note handed by the British Foreign Secretary to the French Ambassador on September 29, 1935, a narrower interpretation of the question of sanctions was put forth. The pledge made at Geneva that Great Britain stood with the League "for collective maintenance of the Covenant in its entirety, and in particular for steady and collective resistance to all acts of unprovoked aggression" was repeated; but with the distinct qualification that it should not apply to mere violations of treaties apart from acts of aggression. "It is at once evident," said Sir Samuel Hoare, "that procedure under Article 16 of the Covenant, appropriate as regards a positive act of unprovoked aggression, is not made applicable as regards a negative act of failing to fulfill the terms of a treaty." The last clause was clearly intended to cover the action of Germany in repudiating the disarmament provisions of the Treaty of Versailles.

The resolution of the Council on April 17 was promptly condemned by Germany in the form of a note delivered to the diplomatic representatives in Berlin of the thirteen governments which had participated in the vote of censure. In its note the German Government "challenged the right of the governments which took part in the resolution of April 17 in the Council of the League of Nations to set themselves up as judges of Germany." It saw in the resolution an attempt at a new discrimination against Germany and it rejected it "in the most resolute manner."

During the entire controversy little concern was shown for the larger issue underlying the action of the German Government. A great principle of law

was made to suffer for lack of a resolute facing of the practical conditions necessary to its observance. As an abstract proposition there is nothing in the relations of states more sacred than the faithful observance of treaty obligations. A large number of publicists, among whom German writers figure prominently, have made the rule *pacta sunt servanda* the very cornerstone of international law. Its character has, indeed, never been regarded with the same sacredness when applied to obligations arising from treaties of peace as when applied to other obligations of a more voluntary character. But even in respect to treaties of peace it has been regarded as a necessary alternative to grave evils and as having in consequence a sort of temporarily sacred character pending the adjustment of the subject-matter of the treaty upon a more equitable basis. It is precisely upon this point that the conditions were lacking for the observance of the rule in the particular instance of the disarmament provisions of the Treaty of Versailles. In the years since 1919 little progress has been made towards the regulation of international relations upon a basis which would insure the economic life of individual states against industrial starvation. It is the bargaining power of armaments in the struggle for economic survival that gives meaning to the demand for equality on the part of Germany. Granting, as in the judgment of the writer it must be granted, that the action of Germany was precipitate and a grave threat to the stability of law and order, there remains the fact that the community of nations has failed as yet to take the constructive measures necessary to remove the most serious of the motives which give vitality to the competition in armaments.

It might be added by way of postscript that in the case of the repudiation by Italy of its international obligations towards Ethiopia the community of nations has faced the underlying issues more realistically. The repudiation itself could scarcely be more flagrant. In addition to the obligations of Italy under the Covenant of the League of Nations, there was the treaty of 1896 by which Italy recognized the independence of Ethiopia; there was the treaty of 1906 by which Italy undertook, with Great Britain and France, to respect and to endeavor to preserve the independence of Ethiopia; there was the exchange of notes with Great Britain in 1925 by which the respective spheres of interest of the parties in Ethiopia were defined more specifically and the pledge of 1906 impliedly renewed; and there was the treaty with Ethiopia of 1928 by which Italy obligated itself to the arbitration of future disputes for a period of twenty years. The Council of the League, however, when presented with the problem, was not content to insist upon the letter of Italy's obligations. It recognized the underlying economic reasons for Italy's action and it sought to meet them in what seemed to be the most feasible way, by securing the acquiescence of the victim of the threatened attack in a series of concessions to Italy which the Council felt gave to Italy a large part of the substance of its demands without an open and formal limitation of the territorial integrity of Ethiopia. Whether the recom-

mendations of the Committee of Five were just to Ethiopia is of course another question. What is significant for the development of international law is that during the course of the negotiations it was quite clearly recognized that, if restraints are to be put upon lawless conduct, account must at the same time be taken of the economic and social conditions which lead a particular state to violate obligations protecting the *status quo*. What is to be regretted is that the leading Powers now in possession of the raw materials of industry and of the opportunities for the investment of capital and for the employment of labor did not see their way to approach the problem in a more constructive manner and seek to assure at their own expense rather than that of Ethiopia a greater measure of economic security to states whose economic life is now dependent upon the commercial policies of other states in the uncertain future. In the formulation of such a world-wide "open-door" policy the United States might well be asked to coöperate.

C. G. FENWICK

## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16–AUGUST 15, 1935

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Chunet*, Journal du droit international; *Cmc.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *Geneva*, A Monthly Review of International Affairs; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department.

#### February, 1935

- 15 CZECHOSLOVAK REPUBLIC—GREAT BRITAIN. Signed convention supplementary to convention of Nov. 11, 1924, to facilitate conduct of legal proceedings. *Czechoslovakia*, No. 1, 1935, *Cmd.* 4876.

#### March, 1935

- 1 CHILE—FINLAND. Exchanged notes at Santiago constituting a provisional commercial agreement. *L. N. M. S.*, May, 1935, p. 138.
- 13 ESTONIA—TURKEY. Clearing agreement signed at Ankara. *L. N. M. S.*, May, 1935, p. 138.
- 21 NETHERLANDS—SWEDEN. Convention for avoidance of double taxation signed at Stockholm. *L. N. M. S.*, May, 1935, p. 138.
- 22 BULGARIA—FINLAND. Commercial agreement signed at Budapest. *L. N. M. S.*, May, 1935, p. 138.
- 27 BRAZIL—GREAT BRITAIN. Signed agreement in Rio de Janeiro respecting commercial payments. *G. B. Treaty Series*, No. 17 (1935), *Cmd.* 4911.
- 27 ESTONIA—POLAND. Protocol regarding customs tariffs signed at Warsaw. *L. N. M. S.*, May, 1935, p. 138.

#### April, 1935

- 9 FRANCE—GREAT BRITAIN. Agreement signed at London for reciprocal exemption from income tax of air transport profits. *France*, No. 1, 1935, *Cmd.* 4898.
- 10 ESTONIA—LATVIA. Clearing agreement signed at Tallinn. *L. N. M. S.*, May, 1935, p. 138.
- 27 GREAT BRITAIN—ITALY. Exchanged notes regarding trade and payments. *G. B. Treaty Series*, No. 24 (1935), *Cmd.* 4838.
- 30 AUSTRIA—GREAT BRITAIN. Exchanged ratifications of convention regarding extradition, supplementary to convention of Dec. 3, 1873. *G. B. Treaty Series*, No. 21 (1935).

#### May, 1935

- 3 FINLAND—GREAT BRITAIN—NORTHERN IRELAND. Agreement signed at Helsingfors

regarding load line certificates to which international convention of 1930 does not apply. *L. N. M. S.*, May, 1935, p. 138.

- 7 ESTONIA—UNITED STATES. Exchanged ratifications of supplementary extradition treaty signed Oct. 10, 1934. *U. S. Treaty Series*, No. 888.
- 16 CZECHOSLOVAK REPUBLIC—RUSSIA. Signed pact of mutual assistance. *Times* (London), May 17, 1935, p. 16; *E. I. N.*, May 30, 1935, p. 10.
- 16 SWITZERLAND—UNITED STATES. Exchanged ratifications of extradition treaty signed Jan. 10, 1935. *U. S. Treaty Series*, No. 889.

20 to August 16 CHACO DISPUTE BETWEEN BOLIVIA AND PARAGUAY. Second special assembly of the League of Nations to deal with dispute met May 20–21, in pursuance of resolution of its Advisory Committee on March 15. *L. N. M. S.*, May, 1935, p. 107; *L. N. O. J.*, Spec. Sup. No. 135. On June 9, Bolivia and Paraguay accepted draft of peace protocol of the neutral Powers (Argentina, Brazil, Chile, Peru, the United States and Uruguay) as mediators in the dispute. On June 12, the Chaco peace protocol and an additional protocol were signed at Buenos Aires providing that armistice should begin on June 14. *L. N. M. S.*, June, 1935, p. 146. Text of protocols: *P. A. U.*, July, 1935, p. 518. On June 14, the "cease firing" order was given at noon. *N. Y. Times*, June 15, 1935, p. 6. Paraguay approved the peace protocol on June 20 and Bolivia on June 21. The protocol was ratified before the mediatory countries at Buenos Aires on June 22. Text: *T. I. B.*, June, 1935, pp. 10 and 31.

On July 1, the Chaco peace conference was inaugurated in Buenos Aires by the President of Argentina with six foreign ministers in attendance. It prolonged the present truce until such time as armies of both countries are reduced to a maximum strength of 5,000 effectives. *N. Y. Times*, July 2, 1935, p. 4. On Aug. 15, a serious impasse arose over status of war prisoners. *N. Y. Times*, Aug. 16, 1935, p. 5. On Aug. 16, the conference announced that no more plenary sessions would be held until progress is made in some commission toward agreement on some of the questions under consideration. *N. Y. Times*, Aug. 18, 1935, p. 2; *L. N. O. J.*, July, 1935, pp. 900–905.

20 to August 15 ETHIOPIA—ITALY. On May 20, Emperor of Ethiopia made personal appeal to League Council to apply Art. 15 of Covenant to dispute resulting from Wal-Wal incident of Dec. 5, 1934. On May 25, Council adopted resolution for submission of dispute to joint arbitration commission (two for each country) in conformity with Art. 5 of Italo-Ethiopian treaty of Aug. 2, 1928. Text of resolutions: *N. Y. Times*, May 25, 1935, p. 1; *L. N. M. S.*, May, 1935, p. 112. On May 25, Mussolini agreed to mediation by League of Nations and arbitration of dispute. *N. Y. Times*, May 25, 1935, IV, 3. Joint commission held first meeting at Milan on June 6, and later met at The Hague from June 26 to July 9, when its sittings were suspended. *N. Y. Times*, July 10, 1935, p. 1; *Times* (London), July 10, 1935, p. 14. On July 4, Ethiopia asked U. S. Government to examine means of securing observance of Pact of Paris; but reply of July 5 rejected appeal on ground that issue is already in process of arbitration. Text: *Press releases*, July 6, 1935, p. 29. On July 10, Ethiopia made formal demand for convocation of Council of League. *N. Y. Times*, July 11, 1935, p. 12. On July 11, League Secretariat sent to Council members texts of three separate awards by the arbitral commission. Summary: *L. N. M. S.*, July, 1935; *N. Y. Times*, July 12, 1935, p. 2; *Times* (London), July 12, 1935, p. 13. From July 31 to Aug. 3, the Council met in special session to provide for resumption of work of arbitral commission, with a fifth arbitrator. Postponed intervention when Britain, France and Italy agreed on compromise and a month's delay. Decided to meet again on Sept. 4 to receive reports of arbitration and

- examine various aspects of the dispute. *N. Y. Times*, Aug. 1-4, 1935, p. 1; *Times* (London), Aug. 1-5, 1935, p. 10. *Geneva, a monthly review*, Aug. 1935. On Aug. 15, conversations began in Paris, between Premier Laval of France, Anthony Eden of Great Britain and Baron Aloisi of Italy. *N. Y. Times*, Aug. 16-17, 1935, p. 1; *Times* (London), Aug. 15-16, 1935, p. 10.
- 20-25 LEAGUE OF NATIONS COUNCIL. Held 86th ordinary session to deal with refugee, mandate, and minority questions, the Ethiopian dispute and other matters. *L. N. M. S.*, May, 1935; *L. N. O. J.*, June, 1935.
- 21 GERMAN FOREIGN POLICY. Chancellor Hitler's address before special meeting of the Reichstag reviewed international problems and defined Germany's policy under 13 heads. Summary: *N. Y. Times*, May 22, 1935, p. 14; *Völkербund* (Geneva), June 21, 1935.
- 21-24 WHEAT CONFERENCE. International conference held in London, extended the life of the world wheat pact, due to expire on Aug. 1, for one year, with all government control undertakings suspended indefinitely. *N. Y. Times*, May 23-25, 1935, pp. 11, 21 and 31. International wheat advisory committee was in session May 22 to 25. *Times* (London), May 27, 1935 p. 11.
- 23 CHINA—JAPAN. On May 23, a clash occurred between Chinese irregulars and Japanese troops. On May 20, Japan presented to Chinese authorities a seven-point demand which the government was forced to accept. Summary: *N. Y. Times*, June 13, 1935, p. 1; *Cur. Hist.*, July-Aug. 1935, pp. 445 and 556; *Foreign Policy Bulletin*, June 14, 1935.
- 24 ARGENTINA—UNITED STATES. Signed convention in Washington for prevention of spread of plant and animal diseases and insect pests. Summary of provisions: *T. I. B.*, May, 1935, p. 11; *P. A. U.*, July, 1935, p. 573. Letter from Secretary Hull to Senate Foreign Relations Committee and text of convention: *Cong. Rec.*, Aug. 22, 1935, p. 14443.
- 24 NEW ZEALAND—SWEDEN. Exchanged notes regarding commerce, customs, and navigation. *G. B. Treaty Series*, No. 23 (1935).
- 26 to June 20 PAN AMERICAN COMMERCIAL CONFERENCE. Held in Buenos Aires. Secretary Hull addressed the conference by telephone on June 8. Four conventions were adopted and 64 projects approved. *N. Y. Times*, June 21, 1935, p. 36; *Commercial Pan. América*, Sept., 1935.
- 29 ARGENTINA—BRAZIL. Signed treaty of friendship and commerce including most favored-nation treatment. *Times* (London), May 31, 1935, p. 15; *B. I. N.*, June 13, 1935, p. 7.
- 29 EGYPT—PALESTINE. Commercial agreement signed in Cairo providing for reciprocal reductions in customs duties and freights. *B. I. N.*, June 13, 1935, p. 11.
- June, 1935
- 3 CZECHOSLOVAK REPUBLIC—RUSSIA. Financial agreement signed at Prague. *B. I. N.*, June 13, 1935, p. 11.
- 3 GERMANY—UNITED STATES. Signed agreement providing for termination of 2d, 3d, 4th, 6th and 7th paragraphs of Art. 7 of treaty of friendship, commerce and consular rights, signed Dec. 8, 1923. *Press releases*, June 8, 1935, p. 424; *T. I. B.*, June, 1935, p. 17.
- 4 GREAT BRITAIN—TURKEY. Signed commercial agreement in Angora, effective for nine months. *B. I. N.*, June 13, 1935, p. 29.

- 4-25 INTERNATIONAL LABOR CONFERENCE. Held 19th session in Geneva, with 52 states represented, four of which, the United States, U. S. S. R., Ecuador and Afghanistan, had joined the organization since the last session. The principle of the forty-hour week without a reduction of the standard of living was approved. Draft conventions and recommendations. *I. L. O. M. S.*, June, 1935; *Cur. Hist.*, Aug., 1935, p. 512.
- 5 WINE CONFERENCE. Convention on analysis of wines was signed at conference in Rome. List of countries represented at the conference: *T. I. B.*, July, 1935, p. 16.
- 11/14 GREAT BRITAIN—RUMANIA. Exchanged notes respecting consular fees on certificates of origin in Palestine and Rumania. *G. B. Treaty Series*, No. 20 (1935).
- 11 LIBERIA—UNITED STATES. Administration of Edwin Barclay, President of Liberia, recognized by the United States. This action regularizes formal diplomatic relations, in abeyance since 1930. *Press releases*, June 15, 1935, p. 445; *N. Y. Times*, June 12, 1935, p. 11.
- 13 MEXICO—UNITED STATES. Signed salvage treaty to facilitate assistance and salvage of vessels in danger or shipwrecked on the coasts of either country. *Press releases*, June 15, 1935, p. 465; *T. I. B.*, June, 1935, p. 22.
- 14 CZECHOSLOVAK REPUBLIC—HUNGARY. Trade agreement embodying most-favored-nation clause, signed at Budapest. *B. I. N.*, June 27, 1935, p. 15; *Central European Observer*, June 28, 1935, pp. 205-6.
- 16 ITALY—RUSSIA. Credit agreement to regulate financing of exports to Russia was signed at Rome. *B. I. N.*, June 27, 1935, p. 28.
- 18 GERMANY—GREAT BRITAIN. Exchanged notes regarding limitation of naval armaments. Text: *G. B. Treaty Series*, No. 22 (1935), *Cmd.* 4953; *T. I. B.*, June, 1935, p. 2. Article: *Cur. Hist.*, Aug., 1935, p. 506.
- 19 INTER-AMERICAN INTELLECTUAL COÖPERATION. State Department announced that Secretary Hull had appointed a national committee of sixteen members, under chairmanship of John W. Studebaker, Commissioner of Education, to coöperate with the Division of Technical and Scientific Exchange of the Pan American Union, recently organized. This action carried out the terms of resolutions adopted by the Seventh International Conference of American States. Names of members: *Press releases*, June 22, 1935, p. 473.
- 20 BELGIUM—UNITED STATES. Supplementary extradition treaty signed at Washington. *Press releases*, June 22, 1935, p. 469; *T. I. B.*, June, 1935, p. 12.
- 24 GERMAN DEBTS. Reich moratorium on long-term and medium-term indebtedness including the Dawes and Young loans, extended for one year by Reichsbank. *N. Y. Times*, June 25, 1935, p. 12.
- 24 GREAT BRITAIN—SALVADOR. Commercial treaty, expiring Sept. 16, has been extended three months. *N. Y. Times*, June 24, 1935, p. 6.
- 24 GREAT BRITAIN—UNITED STATES. Extradition treaty, signed Dec. 22, 1931, came into force. *T. I. B.*, June, 1935, p. 12. Text: *U. S. Treaty Series*, No. 849, *Cmd.* 4928. On July 30, 1935, the adhesion of Newfoundland to this treaty was announced. *T. I. B.*, July, 1935, p. 10.
- 24 LITTLE ENTENTE. Economic council of Little Entente States closed its week-long conference after passing resolutions pertaining to railway affairs. *Danubian Review*, July, 1935, p. 20.

- 26 GREAT BRITAIN—URUGUAY. Trade agreement signed. Summary: *Times* (London), July 4, 1935, p. 13. Text: *CmJ.* 4940.
- 27 BELGIUM—ITALY. Signed trade agreement. *B. I. N.*, July 13, 1935, p. 12.
- 28 MEXICAN CLAIMS SETTLEMENT. Announced that representatives appointed by the United States and Mexico to determine lump-sum amount to be paid by Mexico pursuant to convention of April 24, 1934, completed their work and have found that the sum of \$5,448,020.14 should be paid. *Press releases*, June 29, 1935, p. 483.
- 28 SAN MARINO—UNITED STATES. Exchanged ratifications of supplementary extradition treaty, signed at Washington, Oct. 10, 1934. *U. S. Treaty Series*, No. 891.

*July, 1935*

- 1 CHINA—UNITED STATES. Passport visa agreement came into force. *T. I. B.*, April, 1935, p. 37.
- 3 CANADA—POLAND. Signed trade agreement in Ottawa providing for most-favored-nation treatment. *B. I. N.*, July 13, 1935, p. 12.
- 3 ITALY—NETHERLANDS. Signed trade agreement at The Hague, providing clearing system for payments between the two countries. *B. I. N.*, July 13, 1935, p. 26.
- 8-20 INTELLECTUAL COÖPERATION. Liaison Committee of major international associations met in Geneva, July 8-9, for first time since its foundation in 1925. The International Committee on Intellectual Coöperation met July 15-20, and other committees held meetings. *L. N. M. S.*, July, 1935, pp. 164-172.
- 8 SWEDEN—UNITED STATES. Reciprocal trade agreement, signed May 25, 1935, under Trade Agreements Act of 1934, proclaimed by President Roosevelt, effective Aug. 5, 1935. *Ex. Agr. Ser.*, No. 79.
- 9 TURKEY—UNITED STATES. Parcel post agreement signed May 25 and July 2, 1935, ratified by President Roosevelt. *T. I. B.*, July, 1935, p. 21.
- 12 BELGIUM—RUSSIA. Normal diplomatic relations resumed by an exchange of letters. *N. Y. Times*, July 13, 1935, p. 6; *B. I. N.*, July 27, 1935, p. 11.
- 12 PACT OF PARIS (KELLOGG PACT). In response to inquiries of newspaper correspondents, Secretary Hull issued a statement concerning the pact and its importance in our foreign policy. Text: *Press releases*, July 13, 1935, p. 53.
- 13 RUSSIA—UNITED STATES. Trade agreement, effective for one year, arranged by exchange of identic notes. Text of notes and statement of Ambassador Bullitt. *Press releases*, July 13, 1935, p. 45; *N. Y. Times*, July 14, 1935, p. 1, 6; *T. I. B.*, July, 1935, p. 16; *Ex. Agr. Ser.*, No. 81.
- 22 ALBANIA—UNITED STATES. Exchanged ratifications of naturalization treaty, signed at Tirana, April 5, 1932. *U. S. Treaty Series*, No. 892; *T. I. B.*, July, 1935, p. 13.
- 24 PERMANENT COURT OF INTERNATIONAL JUSTICE. List of nominations for a judge to succeed the late Dr. Adstei (Japanese) was published by the League Secretariat. *L. N. Doc.*, A.14.1935.V.
- 25 THE INTERNATIONAL. Third (Communist) International, with 400 delegates from 50 countries, opened seventh congress in Moscow, its first meeting since 1928. It was decided to relax rigid control over Communist parties and to urge Communists to oppose Fascism. *N. Y. Times*, July 26, 1934, p. 1. Orders from Comintern to Communist parties in capitalist countries, including the United States, made public in Moscow on July 28. *N. Y. Times*, July 29, 1935, p. 1; *Cur. Hist.*, Sept., 1935, p. 665.

- 25 VATICAN CITY—YUGOSLAVIA. Concordat signed in the Vatican. *B. I. N.*, Aug. 17, 1935, p. 29.
- 26-31 INTERPARLIAMENTARY UNION. Held 31st session in Brussels with 300 delegates from 20 countries. *Times* (London), July 27, 1935, p. 11; *Interparliamentary Bulletin*, July-Aug., 1935.
- 29/August 1 GERMANY—UNITED STATES. Exchanged notes regarding the flag incident aboard the S.S. *Bremen* on July 26. Texts: *Press releases*, Aug. 3, 1935, p. 100.
- 31 INDIAN CONSTITUTION. Royal assent given to act passed by British Parliament giving Indian Empire a representative constitution, after seven and a half years' investigations. *N. Y. Times*, Aug. 11, 1935, IV, 5; *C. S. Monitor*, July 31, 1935, p. 1.
- 31 to August 3 LEAGUE OF NATIONS COUNCIL. Met in special session to provide for resumption of work of Italo-Ethiopian Arbitration Commission. Decided to meet on Sept. 4 to receive reports of arbitration and examine various aspects of the dispute. *N. Y. Times*, Aug. 1 and 4, 1935, p. 1.

#### August, 1935

- 1 BELGIUM—GERMANY. Agreement covering payments came into force. Existing restrictions were abolished and payments in foreign currency allowed. *B. I. N.*, Aug. 17, 1935, p. 16.
- 3 CANADA—UNITED STATES. Exchanged ratifications of convention for establishment of tribunal to decide questions of indemnity and future régime arising from operation of smelter at Trail, B. C., signed April 5, 1935. *U. S. Treaty Series*, No. 893.
- 8 DANZIG—POLAND. Initialed four-point tariff agreement. *N. Y. Times*, Aug. 9, 1935, p. 7; *Times* (London), Aug. 10, 1935, p. 9.
- 12 REFUGEE SETTLEMENT IN UNITED STATES. Memorandum of State Department with reference to circular letter No. 111, dated July 19, 1935, from League of Nations concerning possibility of settling refugees in the United States, sent to League of Nations. Text: *Press releases*, Aug. 31, 1935, p. 158.

#### INTERNATIONAL CONVENTIONS

- AIRCRAFT LIABILITY TO THIRD PARTIES ON THE SURFACE. Rome, May 29, 1933.  
*Ratification deposited:* Rumania. Mar. 23, 1935. *T. I. B.*, April, 1935, p. 18.
- AIR TRAFFIC. Warsaw, Oct. 12, 1929.  
*Adhesion:* Poland (on behalf of Danzig). *T. I. B.*, May, 1935, p. 13.
- ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.  
*Signature:* India. *L. N. O. J.*, July, 1935.
- ARGENTINE ANTI-WAR PACT. Rio de Janeiro, Oct. 10, 1933.  
*Proclamation:* Nicaragua. Feb. 15, 1935. *T. I. B.*, May, 1935, p. 3.
- ARMS TRAFFIC. Geneva, June 17, 1925.  
*Ratification:* United States. June 21, 1935. *Press releases*, June 29, 1935, p. 484; *T. I. B.*, June, 1935, p. 8.
- ASYLUM. Montevideo, Dec. 26, 1933.  
*Ratification:* Honduras. Feb. 12, 1935. *T. I. B.*, June, 1935, p. 11.  
*Ratification deposited:* Guatemala. *T. I. B.*, July, 1935, p. 8.
- ASYLUM CONVENTION. Havana, Feb. 20, 1928.  
*Ratification:* Honduras. Feb. 16, 1935. *T. I. B.*, June, 1935, p. 11.

BILLS OF EXCHANGE AND PROMISSORY NOTES. Convention and protocol. Geneva, June 7, 1930.

*Ratification deposited:* Poland (on behalf of Danzig). *T. I. B.*, July, 1935, p. 18.

BILLS OF EXCHANGE AND PROMISSORY NOTES. Stamp laws. Geneva, June 7, 1930.

*Ratification deposited:* Poland (on behalf of Danzig). *T. I. B.*, July, 1935, p. 18.

CHEMICAL WARFARE. Geneva, June 17, 1925.

*Proclamation:* Chile. *T. I. B.*, July, 1935, p. 6.

CONFLICT OF LAWS ON BILLS OF EXCHANGE AND PROMISSORY NOTES. Convention and protocol. Geneva, June 7, 1930.

*Ratification deposited:* Poland (on behalf of Danzig). *T. I. B.*, July, 1935, p. 18.

CONTAGIOUS DISEASES OF ANIMALS. Geneva, Feb. 20, 1935.

*Signatures:*

Bulgaria, Czechoslovak Republic, France, Italy, Latvia, Netherlands, Poland, Rumania, Switzerland. *T. I. B.*, April, 1935, p. 15.

U. S. S. R. *T. I. B.*, June, 1935, p. 13.

COPYRIGHT. Berne, Sept. 9, 1886. Revision. Rome, June 2, 1928.

*Adhesion:* Union of South Africa. Mar. 19, 1935. *Droit d'auteur*, May 15, 1935, p. 49.

Note: Correction of item in the JOURNAL for July, 1935, p. 520:

Consent to ratification by U. S. Senate on April 19, 1935, was reconsidered on April 22, 1935, and Treaty restored to executive calendar. *Cong. Record*, April 22, 1935, p. 6321.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

*Accession* (with reservations): U. S. S. R. May 11, 1935. *T. I. B.*, May, 1935, p. 5.

*Ratification:* Nicaragua. *T. I. B.*, July, 1935, p. 9.

*Ratification deposited:*

Iran (Persia). Apr. 12, 1935. *T. I. B.*, May, 1935, p. 5.

Norway and Rumania. *T. I. B.*, July, 1935, p. 9.

EXPORT AND IMPORT OF ANIMAL PRODUCTS. Geneva, Feb. 20, 1935.

*Signatures:*

Bulgaria, Czechoslovak Republic, France, Italy, Latvia, Netherlands, Poland, Rumania, Switzerland. *T. I. B.*, April, 1935, p. 16.

U. S. S. R. *T. I. B.*, June, 1935, p. 13.

EXTRADITION. Montevideo, Dec. 26, 1933.

*Ratification:* Honduras. June 22, 1935.

*Ratification deposited:* Chile. July 2, 1935. *T. I. B.*, July, 1935, p. 10.

FEE-CHARGING EMPLOYMENT AGENCIES. Geneva, June 30, 1933.

*Ratification:* Spain. Mar. 29, 1935. *T. I. B.*, May, 1935, p. 21; *I. L. O. B.*, July 15, 1935, p. 56.

FLORA AND FAUNA PRESERVATION. London, Nov. 8, 1933.

*Ratification* (with reservation): Great Britain. June 14, 1935. *T. I. B.*, June, 1935, p. 24.

FOREIGN ARBITRAL AWARDS. Geneva, Sept. 26, 1927.

*Signature:* India. *L. N. O. J.*, July, 1935.

HISTORY TEACHING. Montevideo, Dec. 26, 1933.

*Ratification:* Honduras. *T. I. B.*, July, 1935, p. 9.

HOURS OF WORK IN SHEET-GLASS WORKS. Geneva, June 21, 1934.

*Ratification:* Norway. May 3, 1935. *T. I. B.*, June, 1935, p. 22; *I. L. O. B.*, July 15, 1935, p. 55.

INDUSTRIAL PROPERTY. London, June 2, 1934.

*Ratification:* United States. June 27, 1935. *T. I. B.*, June, 1935, p. 21.

- INTER-AMERICAN ARBITRATION. Protocol of Progressive Arbitration. Washington, Jan. 5, 1929.  
*Ratification deposited:* United States. Apr. 16, 1935.  
*Text:* *U. S. Treaty Series*, No. 886.
- INTER-AMERICAN CONCILIATION. Washington, Jan. 5, 1929.  
*Ratification:* Honduras. Feb. 14, 1935. *T. I. B.*, June, 1935, p. 1.
- INTER-AMERICAN CONCILIATION. Washington, Jan. 5, 1929. Additional Protocol, Montevideo, Dec. 26, 1933.  
*Ratification deposited:*  
 Chile. Mar. 10, 1935. *T. I. B.*, April, 1935, p. 1.  
 United States. Aug. 18, 1934. Proclaimed May 8, 1935. *U. S. Treaty Series*, No. 887.
- INTERNATIONAL EXCHANGE SERVICE. Mexico City, Jan. 27, 1902.  
*Ratification:* Colombia. *T. I. B.*, April, 1935, p. 47.
- LIGHTSHIPS. Lisbon, Oct. 23, 1930.  
*Ratification deposited:* China. *T. I. B.*, July, 1935, p. 20.
- LOAD LINE CONVENTION. London, July 5, 1930.  
*Ratification deposited:* Belgium and Japan. *T. I. B.*, July, 1935, p. 20.
- MARITIME SIGNALS. Lisbon, Oct. 23, 1930.  
*Ratification deposited:* China. *T. I. B.*, July, 1935, p. 20.
- MINIMUM-WAGE-FIXING MACHINERY. Geneva, June 16, 1928.  
*Ratification:*  
 Canada. Apr. 25, 1935. *T. I. B.*, May, 1935, p. 21.  
 Bulgaria. *I. L. O. B.*, July 15, 1935, p. 47.
- MOTOR VEHICLES TAXATION. Geneva, Mar. 30, 1931.  
*Accession:* Rumania. *L. N. O. J.*, July, 1935.
- MULTILATERAL COMMERCIAL AGREEMENT INCLUDING FAVORED-NATION CLAUSE. Washington, July 15, 1934.  
*Signature:*  
 Guatemala. May 11, 1935. *T. I. B.*, May, 1935, p. 19.  
 Greece. *T. I. B.*, July, 1935, p. 18.  
*Ratification:* United States. Aug. 24, 1935. *Cong. Rec.*, Aug. 24, 1935, p. 14977.
- NARCOTICS. Geneva, July 13, 1931.  
*Accession:* Afghanistan, Estonia and New Zealand.  
*Ratification:* Ecuador, Japan and Panama. *L. N. O. J.*, July, 1935.
- NATIONALITY. Montevideo, Dec. 26, 1933.  
*Ratification:* Honduras. *T. I. B.*, July, 1935, p. 12.  
*Ratification deposited:* Chile. *T. I. B.*, April, 1935, p. 16.
- NATIONALITY. Protocol on Military Obligation in Cases of Double Nationality. The Hague, Apr. 12, 1930.  
*Adhesion deposited:* Australia. July 8, 1935. *T. I. B.*, July, 1935, p. 5.  
*Ratification:* Salvador. *T. I. B.*, April, 1935, p. 6.
- NATIONALITY. Protocol on Statelessness. The Hague, April 12, 1930.  
*Adhesion deposited:* Australia. July 8, 1935. *T. I. B.*, July, 1935, p. 5.
- NATIONALITY. Special Protocol on Statelessness. The Hague, Apr. 12, 1930.  
*Adhesion deposited:* Australia. July 8, 1935. *T. I. B.*, July, 1935, p. 5.
- NATIONALITY OF WOMEN CONVENTION. Montevideo, Dec. 26, 1933.  
*Ratification deposited:* Honduras. June 26, 1935. *T. I. B.*, June, 1935, p. 14.

- NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919. Revised, 1934.  
*Ratification:* Union of South Africa. Apr. 16, 1935. *T. I. B.*, June, 1935, p. 22; *I. L. O. B.* July 15, 1935, p. 58.
- OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.  
*Adhesion deposited:* Australia. *T. I. B.*, July, 1935, p. 13.
- PAN AMERICAN UNION. Havana, Feb. 20, 1928.  
*Ratification deposited:* Ecuador. May 19, 1935. *T. I. B.*, May, 1935, p. 3.
- PARCEL POST. Madrid, Nov. 10, 1931.  
*Ratification:* Nicaragua. May 6, 1935. *T. I. B.*, May, 1935, p. 23.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Accession of United States. Geneva, Sept. 14, 1929.  
*Ratification:* Panama. May 2, 1935. *T. I. B.*, May, 1935, p. 1; *L. N. O. J.*, July, 1935.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.  
*Ratification deposited:* Ethiopia. Mar. 30, 1935. *T. I. B.*, April, 1935, p. 2.
- POSTAL CONVENTION. Cairo, Mar. 20, 1924.  
*Ratification:* Chile and Honduras. *T. I. B.*, July, 1935, p. 20.
- POSTAL UNION OF THE AMERICAS AND SPAIN. Madrid, Nov. 10, 1931.  
*Ratification deposited:*  
 Ecuador. Mar. 7, 1935. *T. I. B.*, April, 1935, p. 36.  
 Nicaragua. *T. I. B.*, July, 1935, p. 20.
- PREVENTION OF WAR. Geneva, Sept. 26, 1931.  
*Accession:* Nicaragua. Apr. 1, 1935. *T. I. B.*, April, 1935, p. 2; *L. N. O. J.*, July, 1935.
- PRISONERS OF WAR. Geneva, July 27, 1929.  
*Ratification:* Latvia. *T. I. B.*, June, 1935, p. 9.  
*Ratification deposited:* Greece. *T. I. B.*, July, 1935, p. 6.
- PROTECTION OF MOVABLE PROPERTY OF HISTORIC VALUE. Opened for signature on July 15, 1934.  
*Ratification:* Nicaragua. June 5, 1935. *T. I. B.*, July, 1935, p. 23.
- RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.  
*Ratification deposited:*  
 Panama. Mar. 29, 1935. *T. I. B.*, May, 1935, p. 23.  
 Venezuela. May 9, 1935. *T. I. B.*, June, 1935, p. 23.
- RED CROSS. Geneva, July 27, 1929.  
*Adhesion:*  
 Latvia. May 22, 1935. *T. I. B.*, May, 1935, p. 4.  
 Ethiopia. July, 1935. *C. S. Monitor*, July 18, 1935, p. 1.  
*Ratification deposited:* Greece. *T. I. B.*, July, 1935, p. 3.
- REFUGEES STATUS. Geneva, Oct. 28, 1933.  
*Ratification deposited:*  
 Czechoslovak Republic. May 14, 1935. *T. I. B.*, June, 1935, p. 14.  
 Norway. *T. I. B.*, July, 1935, p. 14.
- RELIEF UNION. Geneva, July 12, 1927.  
*Adhesion deposited:* China. *T. I. B.*, July, 1935, p. 14.
- RIGHT TO A FLAG OF STATES HAVING NO SEACOAST. Barcelona, April 20, 1921.  
*Accession:* Iraq and U.S.S.R. *L. N. O. J.*, July, 1935.

RIGHTS AND DUTIES OF STATES. Montevideo, Dec. 26, 1933.

*Ratification:* Honduras. Feb. 16, 1935.

*Ratification deposited:* Guatemala. June 12, 1935. *T. I. B.*, June, 1935, p. 8.

ROAD SIGNALS. Geneva, Mar. 30, 1931.

*Accession:* Rumania. *L. N. O. J.*, July, 1935.

ROERICH PACT. Washington, Apr. 15, 1935.

*Ratification:* Salvador. *T. I. B.*, July, 1935, p. 23.

*Ratification deposited:* United States. July 13, 1935. *T. I. B.*, July, 1935, p. 23.

SAFETY AT SEA. London, May 31, 1929.

*Ratification deposited:* Belgium, Japan, U.S.S.R. *T. I. B.*, July, 1935, p. 14.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, Apr. 12, 1933.

*Adhesion deposited:* Chile. Apr. 12, 1935. *T. I. B.*, May, 1935, p. 7.

*Ratification:* United States. June 13, 1935. *T. I. B.*, June, 1935, p. 13.

*Ratification deposited:*

Germany. *T. I. B.*, May, 1935, p. 7.

Austria. *T. I. B.*, June, 1935, p. 13.

Poland. June 22, 1935.

United States. July 25, 1935. *T. I. B.*, July, 1935, p. 11.

SEAMEN'S ARTICLES OF AGREEMENT. Geneva, June 24, 1926.

*Ratification:* Australia. Jan. 30, 1935. *I. L. O. B.*, July 15, 1935, p. 41.

SPITZBERGEN. Paris, Feb. 9, 1920.

*Adhesion:* U.S.S.R. May 7, 1935. *T. I. B.*, July, 1935, p. 7.

STATISTICS OF CAUSES OF DEATH. London, June 19, 1934.

*Adhesion:*

Australia (on behalf of Papua, Norfolk Islands and New Guinea and Nauru). Mar. 4, 1935. *T. I. B.*, April, 1935, p. 13.

Panama. Apr. 2, 1935. *T. I. B.*, May, 1935, p. 7.

Peru. May 15, 1935. *T. I. B.*, July, 1935, p. 11.

*Ratification:*

Italy. May 6, 1935. *T. I. B.*, July, 1935, p. 11.

Poland. *T. I. B.*, June, 1935, p. 14.

TELECOMMUNICATIONS CONVENTION. Madrid, Dec. 9, 1932.

*Adhesion deposited:* Albania. May 6, 1935. *T. I. B.*, June, 1935, p. 23.

*Ratification deposited:*

Irish Free State. Feb. 15, 1935. *T. I. B.*, April, 1935, p. 37.

Panama. Mar. 29, 1935. *T. I. B.*, May, 1935, p. 23.

Venezuela. May 9, 1935. *T. I. B.*, June, 1935, p. 23.

China, Great Britain, Union of South Africa. *T. I. B.*, July, 1935, p. 21.

TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.

*Adhesion deposited:* Albania. May 6, 1935. *T. I. B.*, June, 1935, p. 23.

*Ratification deposited:* Venezuela. May 9, 1935. *T. I. B.*, June, 1935, p. 23.

TRADE-MARK AND COMMERCIAL CONVENTION AND PROTOCOL. Washington, Feb. 20, 1929.

*Ratification deposited:* Nicaragua. June 7, 1935. *T. I. B.*, June, 1935, p. 21.

TRANSIT OF ANIMALS AND ANIMAL PRODUCTS. Geneva, Feb. 20, 1935.

*Signatures:*

Bulgaria, Czechoslovak Republic, France, Italy, Latvia, Netherlands, Poland, Rumania, Switzerland. *T. I. B.*, April, 1935, p. 15.

U.S.S.R. *T. I. B.*, June, 1935, p. 13.

TRIPTYCHS. Geneva, Mar. 28, 1931.

*Signature:* Rumania. *L. N. O. J.*, July, 1935.

WEIGHT OF PACKAGES ON VESSELS. Geneva, June 21, 1929.

*Ratification:* Bulgaria. May 31, 1935. *I. L. O. B.*, July 15, 1935, p. 47.

WHALING. Geneva, Sept. 24, 1931.

*Accession deposited:* Ecuador. Apr. 13, 1935. *T. I. B.*, May, 1935, p. 21.

*Ratification:*

France. May 16, 1935. *T. I. B.*, June, 1935, p. 20; *L. N. O. J.*, July, 1935.

United States. Aug. 24, 1935. *Cong. Rec.*, Aug. 24, 1935, p. 14990.

WHITE SLAVE TRADE. Paris, May 18, 1904.

*Ratification:* Chile. *T. I. B.*, July, 1935, p. 15.

WHITE SLAVE TRADE. Paris, May 4, 1910.

*Ratification:* Chile. *T. I. B.*, July, 1935, p. 15.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.

*Accession:* Afghanistan. Apr. 10, 1935. *T. I. B.*, May, 1935, p. 9; *L. N. O. J.*, July, 1935.

WHITE SLAVE TRADE (WOMEN OF FULL AGE). Geneva, Oct. 11, 1933.

*Accession:* Afghanistan, Iran. *L. N. O. J.*, July, 1935; *T. I. B.*, May, 1935.

*Ratification deposited:* Norway and Rumania. *T. I. B.*, July, 1935, p. 15.

WINES. Rome, June 5, 1935.

*Signatures:* *T. I. B.*, July, 1935, p. 16.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.

(Revised, 1934.)

*Ratification:*

Hungary. May 11, 1935. *I. L. O. B.*, July 15, 1935, p. 52.

Norway. May 3, 1935. *T. I. B.*, June, 1935, p. 22.

## ITALO-ETHIOPIAN COMMISSION OF CONCILIATION AND ARBITRATION <sup>1</sup>

### AWARD OF SEPTEMBER 3, 1935

Neither the Italian Government nor its agents on the spot can be held responsible for the Walwal incident on the Italian-Ethiopian frontier December 5, 1934.

Although the Ethiopian local authorities by their attitude may have given the impression that they had aggressive intentions, nevertheless the Ethiopian Government cannot be held responsible for the actual incident of December 5.

1. By an exchange of notes dated May 15 and 16, 1935, between the Italian Minister at Addis Ababa and the Minister for Foreign Affairs of Ethiopia, the Italian and Ethiopian Governments agreed to submit to the procedure of conciliation and arbitration provided for in Article 5 of the Treaty of Amity between Italy and Ethiopia of August 2, 1908, "the *de facto* circumstances of the incident which took place at Walwal on December 5 and 6, 1934, and the responsibilities in connection therewith." As it appears from Resolution No. 1 of the League Council dated May 25, 1935, the two governments also agreed to submit to the same procedure "incidents which have taken place on the Italo-Ethiopian frontier since December 5, 1934."

It was also stated in this resolution of the League Council that the Italian Government, in view of the request which had been made to it, raised no objection regarding the nationality of the arbitrators appointed by the Ethiopian Government.

2. The two governments accordingly appointed as members of the Commission, the former, Count Aldrovandi, Ambassador of H. M. the King of Italy and M. Montagna, Counsellor of State of the Kingdom of Italy, and the latter M. A. de Geouffre de la Pradelle, Professor of International Law at the University of Paris, Director of the Institute of International Studies, and Mr. Pitman B. Potter, Professor of International Organisation at the Graduate Institute of International Studies of Geneva, a citizen of the United States of America.

They also appointed as Agents attached to the Commission, the former, M. S. Lessona, Professor at the University of Florence, and the latter, M. G. Jeze, Professor at the University of Paris.

3. The Commission constituted as above held a first session at Milan on June 6 and 7, at which it laid down its procedure; its next meeting, which was to take place at Scheveningen (Netherlands) was postponed until June 25 to enable its members to take cognizance of the claims, arguments, and evidence of the parties.

<sup>1</sup> League of Nations Document C.332.M.169.1935.VII.

4. On June 18, 1935, the Ethiopian Government stated that it stood by the memoranda submitted by it to the League of Nations on January 15 and May 22 (C.49.M.22.1935.VII. and C.230.M.114.1935.VII).

On June 22, the Italian Government submitted to the arbitrators a memorandum specially prepared for them.

5. The Commission, which met at Scheveningen on June 25, 1935, heard the statement of the Italian Government's Agent. The Ethiopian Government's Agent having, in the course of his statement in reply, touched on the question of the "ownership" of the territory in which Walwal is situated, the Italian Agent objected to the examination of this question which, in his government's opinion, did not come within the Commission's competence.

The members of the Commission disagreed as to their power to determine its competence, and regarding the recourse to the fifth arbitrator provided for by the Treaty of 1928.

The Commission was accordingly obliged to suspend its proceedings on July 9, 1935.

6. The interlocutory question thus raised was settled by the League Council, to which the two governments applied in order to obtain an interpretation of their agreement regarding the precise scope of the mission entrusted to the Commission of Conciliation and Arbitration.

The Council was of opinion that the two governments "did not agree that the Commission should examine frontier questions" and that consequently "the Commission must not, by its decision on the Walwal incident, prejudge the solution of questions which do not fall within its province, and that it would be prejudging that solution if it founded its decision on the opinion that the place at which the incident occurred is under the sovereignty either of Italy or of Ethiopia."

It considered that "while it is always open to the Commission to take into consideration, without entering upon any discussion on the matter, the conviction that was held by the local authorities on either side as to the sovereignty over the place of the incident, the Commission has not to take into account the circumstance that Walwal is under the sovereignty of one or other of the two parties, but must concern itself solely with the other elements in the dispute relating to the Walwal incident."

It noted the declaration of the two parties to the effect that the four members of the Commission would proceed "without delay to designate the fifth arbitrator whose appointment might be necessary for the carrying through of their work."

Lastly, the Council, "confident that the procedure would have brought about the settlement of the dispute before September 1, 1935, invited the two governments to inform it of the result not later than September 4, 1935."

7. The Commission met at Paris on August 20, 1935, and proceeded to designate the fifth arbitrator. Its choice unanimously fell upon M. N. Politis, Greek Minister at Paris, member of the French Institute and the

*Institut de Droit international*, former Minister for Foreign Affairs, ex-President of the League Assembly, Honorary Professor in the Faculty of Law of Paris University, who was requested to assist it in the event of disagreement.

8. After hearing on that same day the statement of the Ethiopian Agent, the Commission decided to proceed to Berne to receive the depositions of a number of persons called by the Italian Government.

9. The depositions were made on August 23, 24 and 25, 1935. They were followed by the final statement of each of the two Agents.

10. On its return to Paris on August 26, the Committee began its discussions on the questions submitted for its consideration.

The four arbitrators were unable to agree either as to the actual circumstances of the Walwal incident or as to the responsibilities arising in connection therewith.

11. The intervention of the fifth arbitrator thus became necessary. It took place on August 29.

12. Having taken note of the general contents of the dossier, the various parts of which had been communicated to him on his appointment, the fifth arbitrator proceeded to discuss, in conjunction with the other members of the Commission, the pleadings on either side of the questions in dispute.

13. As a result of this discussion the Commission arrived at the following decision:

#### THE WALWAL INCIDENT

14. The Walwal district, situated in a desert country and frequented by nomad tribes under the authority of Britain, Italy or Ethiopia, is of special importance owing to the wells, some 300 in number, in the territory, the water of which is indispensable for the requirements of the tribes in question and their livestock.

15. This area has been controlled since 1928, and permanently occupied since 1930, by the authorities of the Italian Somaliland Colony.

16. The Italian occupation of the area is symbolized by the fortified post of Walwal, which is subordinate to that of Warder, about  $12\frac{1}{2}$  km. distant. Although it has not been officially recognized by the Ethiopian Government, it never gave rise to any official protest from that government until the Walwal incident.

17. This occupation had given the Italian authorities the conviction that the Walwal area was under Italian authority and was recognized by Ethiopia and the United Kingdom, inasmuch as it was a constant practice for the tribes under their influence to use the Walwal wells under the supervision of the Italian authorities.

18. On the other hand, the Ethiopian authorities were convinced that the area formed part of their national territory.

19. In recent years, mutual suspicion and animosity had developed between the Italian and Ethiopian authorities. The Italian authorities be-

came convinced that the Ethiopians had hostile intentions, and the Ethiopian authorities had the same conviction about the Italians.

20. In such an atmosphere of suspicion and apprehension, the slightest incident might lead to a misunderstanding and degenerate into a serious conflict.

21. On November 22, 1934, an Ethiopian force of about 600 regular and irregular troops, under the command of Fitaorari Shiferra, Governor of Jijija and Ogaden, Fitaorari Alemayehu, and Omar Samantar, an Italian deserter with a price on his head for the murder of an Italian officer, arrived in front of the Italian post at Walwal as the protective escort of an Anglo-Ethiopian commission, which, having completed the demarcation of the frontier between Ethiopia and British Somaliland, and having instructions to make a grazing survey in Ogaden, was due next day at Walwal, where there was an Italian garrison consisting at that time of about 160 native soldiers (*dubats*).

22. The Ethiopian force, considering itself to be in national territory, advanced towards the wells; its advance was opposed by an Italian force, commanded by a native N.C.O. who asserted that the Walwal area was Italian territory. Under the pressure of greatly superior numbers, the *dubats* were obliged to fall back, leaving the Ethiopians in possession of ten or fifteen wells.

23. Next morning, November 23, the Anglo-Ethiopian commission arrived on the scene; at its head were, on the British side, Lt.-Col. Clifford, and on the Ethiopian side, Fitaorari Tessama Bante. The same day, they sent a letter to the officer commanding the Italian forces in the area, protesting against the opposition to the advance of the Ethiopian force on the previous day, and against the forcible carrying-off of one of the commission's N.C.O.'s with his rifle.

24. Next morning, the Italian commanding officer, Captain Cimmaruta, visited the members of the commission. he declared that he was not competent to discuss the main subject of their protest, "a problem which concerns only the political authorities"; but in explanation of the disappearance of the Ethiopian N.C.O. he stated that the latter was an Italian deserter who had voluntarily given himself up. He proposed to hold an enquiry into the matter, and offered, in order to avoid incidents, to establish a provisional line of separation between the Italian and Ethiopian forces. This offer, which, in form, appeared to the Anglo-Ethiopian commission to be "sincere and opportune," was not carried out. Captain Cimmaruta proposed to indicate the position of the two opposing lines by marks and signatures on tree-trunks; this proposal, however, was rejected by the Ethiopian commission, lest its acceptance of a provisional *de facto* situation might create a precedent favorable to the Italian view. Subsequently, however, the Ethiopian commission agreed to the establishment of a provisional line of separation marked by twigs or thorns.

25. To give the Ethiopians access to other wells in addition to the ten or fifteen in their possession, the Italians were asked to withdraw a few metres; Captain Cimmaruta refused, but offered to allow the Ethiopians to draw water behind the Italian lines, under his supervision. The Anglo-Ethiopian commission did not see its way to accept this offer.

26. During the conference between Captain Cimmaruta and the commissioners, two Italian aeroplanes flew low over the Anglo-Ethiopian camp, where the British and Ethiopian flags were flying side by side, and the commissioners had the impression that the machine-gun of one of these aeroplanes, which was piloted by Major Porru Locci, had been trained upon them; they regarded this as a provocation, and protested indignantly. Giving evidence before the Conciliation and Arbitration Commission, however, Major Porru Locci declared on his honor as an officer and a gentleman that the machine-gun of his aeroplane was not trained upon the Anglo-Ethiopian camp, though a camera was. He explained that a wrong impression might be gained because the machine-gun was mounted transversely on the fuselage, and consequently, when the aeroplane banked, the machine-gun would appear to be trained on the ground. He also added that his flight over the camp was in no sense a hostile demonstration: under orders from his superior officers, he was carrying out a reconnaissance in search of Captain Cimmaruta.

27. Moved by his "great indignation" at this incident, which he regarded as a "provocative demonstration," Lt.-Col. Clifford decided to withdraw the British mission to Ado, some thirty kilometres from Walwal, in order not to complicate the situation for the Ethiopian authorities, and to guard against any regrettable international incident; accordingly, next day, November 25, the British and Ethiopian missions left Walwal with their respective escorts of 30 and 50 men.

28. In the meantime Fitaurari Shiferra's force remained on the spot and its effectives, after receiving further reinforcements, ultimately attained a strength of 1,400 to 1,600 men; its presence and the increase in its strength naturally added to the misgivings of the Italian authorities which they believed to have been justified in view of documents they subsequently found in the Ethiopian camp. The Italian authorities thereafter considered that the Ethiopian troops' claim to be the escort of the Anglo-Ethiopian commission was clearly untrue and that the reason why it did not follow the commission was that it was planning to attack the Italian garrison at the first opportunity with a view to seizing forcibly the Walwal wells; in its report dated November 30, 1934, paragraph 20, the Anglo-Ethiopian commission explained that the "Ethiopian escort" remained in its position at Walwal in order to avoid the appearance of a retreat which might cause a rising among the population of Ogaden seriously compromising the safety of the commission; in the proceedings before the Commission it was further stated, on

behalf of Ethiopia, that believing themselves to be in their own territory, the forces which had advanced as far as the wells could not retire without wounding the pride and lowering the prestige of the nation; it should lastly be noted that on being asked by Captain Cimmaruta whether the troops which remained at Walwal and which the commission continued to regard as its escort really formed part of the commission's Ethiopian escort, Lt.-Col. Clifford made no reply.

29. For ten days after the commission's departure the Ethiopian and Italian troops remained in their positions, facing each other at a distance which in places was no more than two metres, their loaded rifles in their hands, challenging, insulting and provoking each other.

30. Nevertheless, in accordance with his government's recommendations, the Governor of Italian Somaliland continued to give the commander of the Warder-Walwal sector formal written orders to refrain absolutely from any hostile act so long as the Ethiopians did not use their arms against the Italian posts; and on his side the commander of the sector, Captain Cimmaruta, repeatedly approached the Anglo-Ethiopian commission and the Ethiopian military chiefs urging that the necessary precautions be taken to prevent any incident. On November 26, 1934, he felt uneasy as to the intentions of the Fitaorari Shiferra and warned him that he would take such decisions as were required according to his reply. On December 4, having learnt that on the previous night his men had tried to force the Italian line by removing the brushwood which marked it, Captain Cimmaruta sent him word that any act of violence on his part would be countered by force.

31. At this juncture reinforcements arrived on both sides of the lines. On both sides, the men watched each other, and their nervousness increased owing to the fact that every day shots were heard—either accidental shots or shots at game.

32. Suddenly, on December 5, towards 3.30 p. m. according to some and towards 5.30 p. m. according to others, following on a shot the origin of which is disputed, a general fight began. At the sound of the firing, Captain Cimmaruta, who was at Warder, ordered two tanks and three aeroplanes to leave for Walwal immediately, he himself also proceeding thither in a light lorry. He arrived at Walwal shortly before 6 p.m., one tank and one aeroplane arriving a few minutes before him. The other tank and aeroplanes came up shortly after his own arrival. Captain Cimmaruta found his men, consisting at this time of about 500 *dubats*, having only native non-commissioned-officers in command, forced back beyond the original line, with their ammunition practically exhausted. He had some cartridges found on disabled men distributed among them and called for ammunition to be sent from Warder. This ammunition arrived two hours later. Meanwhile night was falling, the fighting became desultory and soon ceased altogether. On December 6 at dawn fighting began again and soon the Ethiopians were

routed and fled in the direction of Ado, leaving on the ground and in the neighborhood 130 dead and a large number of wounded. The Italian *dubats* lost 30 dead and 100 wounded.

33. Two diametrically opposite accounts are given of the origin of the first shot which caused the fight. According to one version this shot was fired from the Italian line, after two orders clearly heard in the Ethiopian ranks had been given, namely first "A terra" and then "fuoco." According to the other version the shot was fired by an Ethiopian soldier, standing upright, in the direction of a little tree in which was sitting, on sentinel duty, an Italian *dubat*, who, wounded slightly in the cheek, immediately fell or let himself drop down. According to both versions the shot was the signal for firing from the same side.

34. The Ethiopian version is based:

1. On the aggressive intentions of the Italian forces as alleged by a number of *dubat* deserters who came, before December 5, to the headquarters of the Anglo-Ethiopian commission, which took their evidence later;

2. On the report of Fitaorari Shiferra which mentions the orders "A terra" and "fuoco" alleged to have been given in the ranks of the *dubats*, whereas, in the evidence given before the Commission of Conciliation and Arbitration and in particular according to Captain Cimmaruta's statement, such orders are never given to *dubats* in Italian;

3. On the evidence of an Ethiopian *sich-attendant* who was not an eyewitness of the beginning of the fight, he himself declaring that, when lying in his tent, he heard three shots one after the other and seized his rifle to proceed to the lines, during which time three bullets fell on his tent.

35. The Italian version is based on the following:

1. The telegraphic reports, dated December 6 and 7, 1934, from Commandant Montanari, the military chief of the area, to the Government of Somaliland, conveying the evidence of the *dubats* who were the only eyewitnesses of the first events, and who state in particular that "an attack in force, unexpectedly launched by the Ethiopians under the Fitaorari Tessamma, without any provocation on our part, compelled our *dubats* to fall back after a strenuous resistance";

2. The report dated December 14, 1934, from the Government of Somaliland to the Colonial Ministry at Rome, giving a summary of the information it had received by that date, according to which "an *ascari* of the Fitaorari Shiferra stood up and fired a shot in the air, which it seems was to serve as a signal, since it was immediately followed by a sharp fusillade on the part of the Ethiopians";

3. The evidence, taken by the Commission of Conciliation and Arbitration, in the absence of Italian officers and non-commissioned officers—since there were none on the spot at the time of the engagement—of four *dubats*, all of whom are now non-commissioned officers but only one of whom was so at the time of the incident. They were at Walwal on December 5, and state that they saw the first shot fired

from the Ethiopian ranks, adding a new detail, namely, that the shot was fired at a sentry posted in a tree. These witnesses did not give their evidence until nearly nine months after the event; they did not specify whether the shot which they say they saw come from the Ethiopian ranks was fired intentionally or accidentally at the Italian sentinel or whether the latter's fall was due to a deliberate or an involuntary movement.

36. Consequently the Commission is inclined to think that this incident was due to an unfortunate chain of circumstances; the first shot might have been accidental, like the numerous and frequent shots that preceded it. It is quite comprehensible that, in the nervous, excited and suspicious state of mind of the opposing troops, who had for two weeks been placed in a dangerous neighborhood, this shot led to the regrettable results which ensued.

37. In these circumstances, the Commission, taking into account the limit of its powers under the resolution adopted by the Council of the League of Nations on August 3, finds:

1. That neither the Italian Government or its agents on the spot can be held responsible in any way for the actual Walwal incident; the allegations brought against them by the Ethiopian Government are disproved in particular by the many precautions taken by them to prevent any incident on the occasion of the assembling at Walwal of Ethiopian regular and irregular troops, and also by the absence of any interest on their part in provoking the engagement of December 5; and

2. That although the Ethiopian Government also had no reasonable interest in provoking that engagement, its local authorities, by their attitude and particularly by the concentration and maintenance, after the departure of the Anglo-Ethiopian commission, of numerous troops in the proximity of the Italian line at Walwal, may have given the impression that they had aggressive intentions—which would seem to render the Italian version plausible—but that nevertheless it had not been shown that they can be held responsible for the actual incident of December 5.

#### INCIDENTS SUBSEQUENT TO DECEMBER 6, 1934

38. From December 6, 1934, to May 25, 1935, various incidents occurred between the Italian and Ethiopian forces, some following upon the Walwal incident, and others unconnected with it.

A careful examination of the facts alleged on both sides shows that, of these incidents, the first-named, which followed upon the Walwal incident, were of an accidental character, while the others were for the most part not serious and of very ordinary occurrence in the region in which they took place.

In these circumstances, the Commission is of opinion that in respect of these minor incidents no international responsibility need be involved.

In faith whereof the present decision has been done in duplicate and, after

signature by the members of the Commission, has been communicated to the Agents of the parties.

Done and deliberated at Paris on September 3, 1935.

(Signed) POLITIS  
ALDROVANDI  
A. DE LA PRADELLE  
MONTAGNA  
PITMAN B. POTTER

### ROYAL HUNGARIAN SUPREME COURT

HUNGARIAN RADIO CO. *v.* GRAMOPHONE CO., LTD., LONDON  
*Budapest, May 24, 1935*

Gramophone records made of the performances of foreign artists may be performed publicly in Hungary or broadcast over the radio without their consent.

Provisions of the Hungarian Copyright Law and the Berne Convention of 1886 for the protection of literary and artistic works, revised at Berlin, 1908, and at Rome, 1928,<sup>1</sup> construed.

[Translation]<sup>2</sup>

A final decision in a law suit was given on January 30, 1935, under No. 9. P.41702/934/1, before the Budapest Royal Court, which suit was instituted by the Magyar Telefonhírműve és Rádió R.T., plaintiff, represented by Dr. Louis Ludinszky, a Budapest attorney, against the Budapest representative of the Gramophone Co., Ltd., defendant, represented by Dr. Herbert Trebits, a Budapest attorney, concerning the non-existence of author's right. An appeal was filed on March 4, 1935, against the judgment of the Budapest Royal Court on the basis of Article 18, Law VIII of 1925, under P.I.41702/1934/10. A hearing of the case having taken place on May 24, 1935, the Royal Hungarian Supreme Court rendered the following final judgment:

The Royal Hungarian Supreme Court dismissed the appeal of the defendant with costs (250 gold pengő).

The reasons are the following:

I. The fact that the plaintiff in a letter dated August 8, 1934, noted from a letter of defendant dated August 2, 1934, that the defendant forbids the use of the records of its factory for radio broadcasting can only be understood to mean that the plaintiff acknowledged the fact that the defendant forbade the use of the records, but it cannot be inferred that the plaintiff acknowledged the protest as justified and binding.

There is therefore no basis for the defendant's claim, submitted also in his appeal, that the plaintiff through an agreement to this effect, obliged himself to acknowledge the protest as justified and binding.

<sup>1</sup> League of Nations Treaty Series, No. 2816, Vol. 123, p. 235.

<sup>2</sup> Translation supplied through the courtesy of the American Consul General at Budapest.

Consequently in the law suit filed on the basis of Article 130 of the Code of Civil Procedure the question had to be examined whether, in consideration of the protection granted to performing artists under the copyright law, the broadcasting of an artist's performance through gramophone records is subject to the permission of the gramophone factory, owing to a transfer of rights of the performing artist.

Therefore, the court had to ascertain what constitutes the legal status of the performing artist in the use and utilization of his artistic performance.

The performing artist does not create, but only brings before the public an already existing work of art in an artistic performance. The performing artist is therefore not entitled to copyright protection, although an adequate protection of the performance of an artist who shows individual conception and style must undoubtedly be provided.

At a conference held at Rome for the revision of the Berne convention the hope was expressed that the various governments should consider the possibility of establishing rules for the protection of the rights of performing artists, because at this conference the proposition that the copyright of the performing artists be assured, was not adopted, since a majority opposed it on the basis that the performing artist is not considered the author of a "composition."

The defendant is basing his claim, that the performance of an artist recorded for mechanical performance comes also under the provisions established for works (compositions) entitled to copyright, on Article 8 of the Copyright Law.

This provision of the law, however, cannot be interpreted as meaning what the defendant claims.

According to Article 8 of the Copyright Law, "Translations, adaptations, including adaptation of the performance of an artist for mechanical production (Article 6, par. 9), also re-arrangements (revisions), etc., enjoy the same right as the original works (compositions) without infringement of the rights of the original author."

According to the official explanation of the law by the Cabinet Minister who introduced the bill in Parliament, the artistic adaptation of a composition reflects the adapted work through the personal artistic performance of the artist, by way of gramophones or similar instruments.

The above-mentioned Article 8 protecting adaptations, revisions, etc., actually refers to the adaptations, revisions, etc., mentioned in Article 6, par. 10, and consequently it protects the adapter, reviser, etc., who adds his own creating work to the original by which certain changes are effected in it; whereas, on the other hand, an artistic "adaptation" by somebody who merely performs, reflects the original work in an unchanged form in his performance and hence in no sense does he create a new work, however artistic or individual his performance may be.

Although the ministerial interpretation regarding Article 8 acknowledges

the performing artist as the author of the artistic adaptation, it is plain that in the sense of the Copyright Law, he can not be considered as the author of the composition.

Though it is true that the provisions of Article 8 of the Hungarian Copyright Law regarding the performing artist might have been drafted under the influence of the respective provisions of the German and Austrian copyright laws, which consider the activity of the performing artist as completing the performed work, and the artist himself as author of the completion, this fact cannot be taken into consideration when interpreting the respective provisions of the Hungarian Copyright Law for the reason that the fiction which considers the result of the performing artist's activity as a work in itself, is steadily losing ground as appears from the draft of the German Copyright Law issued in 1932.

And though the convention of Berne, and subsequently the convention of Rome in Article 2, paragraph 2, gives the same right to adaptations as to original compositions, it obviously did not mean the activity of the performing artist also, as otherwise there would not have been submitted to the Rome conference, which led to the conclusion of the convention, a special motion to provide a certain copyright protection for performing artists and when this motion was overruled, the conference would not have merely expressed the wish that the various governments consider the possibility of making rules by which performing artists may assert their claims.

Therefore the defendant's standpoint, that the Rome convention in paragraph 2 of Article 2 also assured to the performing artist the protection extended to the author in Article 11*bis* according to which the author has the exclusive right to permit the performance of his compositions for the general public through the radio, is erroneous. There is a sharp difference between adaptation—*i.e.*, the activity of an author (composer) who creates a work (composition)—mentioned under Article 8 of the copyright law and procedure contained in Article 6, paragraph 10, on the one hand, and the mention in Article 8 of "adaptation connected with artistic activity" to which Article 8 of the Hungarian Copyright Law also endeavored to assure a certain protection not closely defined. Such protection was permissible within Article 8 to adaptations mentioned in Article 6, paragraph 10.

Since the extent of this protection cannot be ascertained from the law itself, it is the task of the court to draw the limits of this protection by interpreting the law in accordance with present-day ideas.

Article 8 protects an artistic performance intended for mechanical representation and refers in this connection to paragraph 9 of Article 6 which makes the author's consent a condition of the transmission of his work to instruments of mechanical representation and their stationary or exchangeable parts (records, cylinders, films, etc.).

Such instruments of mechanical representation are the gramophone, the film, but also the radio.

The Royal Supreme Court does not share in this respect the view of the Royal Court of Justice, according to which broadcasting of the work can not be considered a transmission to a mechanical instrument in the sense of paragraph 9 of Article 6, since recording of a work by a mechanical instrument is understood by the term "transmission."

The law does not specify that the transmission must be effected through an instrument which records it; such a constriction of the law would not be justified in view of the necessity of the protection of radio broadcasting.

According to the correct interpretation of the provision of the law in question, transmission of the work to any instrument which reproduces it through mechanical means is understood.

The sound waves of speech, song and music before the microphone cause corresponding changes of electrical current in the microphone; these changes, taken up and strengthened by the sender, are broadcast as radio waves into the space by the antenna and, in the receiver, through its own antenna, these electrical waves cause changes of current which bring about adequate sound waves in the ear-apparatus or loudspeaker. The ear-apparatus or loudspeaker, therefore, transmits the speech, song or music through a mechanical process, consequently broadcasting of such performances is nothing but transmission in the sense of paragraph 9 of Article 6 to an apparatus capable of mechanical reproduction, *i.e.*, performance. Radio broadcasting is therefore not only a transmission but also a reproduction through mechanical means of the sound.

When the Copyright Law was enacted, the legislator drafting Article 6, paragraph 9, had in mind the gramophone records and the mechanical apparatus then existing (mentioned in Article 13, paragraph one, point 1, of the Berne agreement), and he could not have thought of the radio, the importance of which was not known at that time. There is, however, no reason why Article 6, paragraph 9, of the Copyright Law should not now be applied also to the radio, since by giving such an interpretation to the above-quoted paragraph the Hungarian authors also enjoy the right of broadcasting their works through the radio to which the authors of foreign works are entitled in our country under Articles 4 and 6 of the Rome convention.

This interpretation of Article 6, paragraph 9, therefore, on the one hand includes the protection granted to the author by Article 13, paragraph 1, point 1, of the Rome convention (in which the convention mentions only the gramophone and apparatuses which record the work), and, on the other hand, also includes the protection which Article 11*bis* of the Rome convention deemed necessary to mention specially. In applying the provisions of the convention within the competence of Article 6, paragraph 9, of the Copyright Law, the cases mentioned in Article 13, paragraph 1, point 1, must therefore be separated from those mentioned in Article 11*bis*.

With regard to the above, and according to a correct interpretation of the provision of Article 8 which considers the performing artist's work for me-

chanical production entitled to the same protection as the original work, the performing artist has the exclusive right to permit that the reproduction of his artistic performance by gramophone, film or similar apparatus, be duplicated and be brought into circulation, and that it be *directly* transmitted to the public—for instance, from a concert hall, where the artist is performing in person—through the radio or the telephone news service. The permission to transmit the performance of an artist by gramophone records (films) is considered to include the permission of multiplication, publication and circulation of the transmission, unless the contrary follow from the particular circumstances of the case.

II. A further question is whether gramophone records made with the permission of the performing artist may be used for public performance or for radio broadcasting without his permission.

Articles 49–55 of the Hungarian Copyright Law grant exclusive author's right of the public performance of their work only to the authors of plays, musical plays, and musical compositions, and Article 74 to the authors of motion picture plays.

Though Article 51 of the Copyright Law refers to Article 8, the protection of the public performance of plays, musical plays, and musical compositions revised, adapted, translated according to Article 6, paragraph 10, and Article 7 was evidently intended, and not the protection of the performance of an artist reproduced by gramophone record or other similar apparatus, which, according to the above, can not be considered as coming under the same category as a "work" (musical composition, etc.).

For the same reason no protection of the performing artist against public performance can be inferred from the provisions contained in Articles 54 and 74 of the Copyright Law which stipulates that the provisions of Article 8 are to be correspondingly applied also to the public performance of plays, musical plays, and musical compositions, as well as of motion picture productions.

Considering further that according to Article 53 of the Copyright Law the author of the text of a musical composition has no right to object to the public performance of a record made with his permission, it is obvious that the law did not intend to make the use of the records for public performance dependent on a permission of the performing artist whose part is generally less important than that of the author of the text.

The Court of Justice was correct in stating that Article 52 of the Copyright Law was intended to provide protection only to the authors of plays, musical plays and musical compositions regarding the public performance through a mechanical apparatus, but not to the performing artists.

Hence, according to our Copyright Law, gramophone records or films rightfully made of the performance of an artist may be used for public performance without his permission.

If the performing artist has no exclusive right of public performance of his

work recorded by gramophone or film, it may be justly inferred that the right of broadcasting his performance through the radio cannot depend on his permission either.

III. The view as taken by the Supreme Court that the permission of the performing artist is not required for the broadcasting of gramophone records through the radio is based further on the following considerations:

The permission of the composer of a musical composition is certainly required for the public performance or broadcasting over the radio of a gramophone record made of his copyrighted work.

If, besides the permission of the composer, the permission of the performing artist would be also required, composers would be unfairly hampered in selling and disposing of their compositions, because while it is usually not difficult to obtain the permission of composers through their various organizations established for this purpose, the difficulties to obtain the permission of the performing artist would, for various reasons, be almost insuperable.

It is also to be considered that the performing artists receive a proper fee for their performances when these are recorded, and there are no reasons deserving consideration why they should be reserved a participation in the utilization—which also includes public performance and broadcasting over the radio—of the records made with their permission. The fee paid to the artist for recording may also be considered a fee for the use of the record for public performance and radio broadcasting.

The draft of the German Copyright Law published in 1932 desires to limit, explicitly referring to foreign legislative acts, the protection granted to the performing artist in a way that his exclusive rights do not extend to the use of mechanical instruments, gramophone records, films, made and put into circulation with his permission for public performance or radio broadcasting.

IV. Therefore, when Article 8 of our law provides that the performances of a performing artist enjoy the same protection as original compositions, it does not thereby indicate that the protection granted to the performing artist is identical with that enjoyed by the author in every respect and in its full extent; it merely indicates that he too is entitled to protection greater than that afforded by ordinary civil law; hence he may demand the application of legal procedure defined in Article 18 of the Copyright Law, to anybody who violates his rights.

Notwithstanding that the production of a performing artist cannot be termed a composition or original work and notwithstanding that the performing artist cannot be considered as an author in the sense of the Copyright Law, Article 8 of the latter assures to the production of the performing artist a protection not clearly defined but nevertheless equal to that assured to original compositions; hence the performing artists being thus specially favored, the practice of the court cannot extend the limits of the protection granted to the performing artist beyond justified limits.

Accordingly, Article 8 of the Copyright Law shall be correctly interpreted, upon comparison with other provisions of the law, to the effect that the performing artist has the exclusive right to permit that his artistic performance recorded by gramophone, film or other similar apparatuses be duplicated, published and put into circulation, and at the same time he has the exclusive right to permit the broadcasting of his artistic performance directly through the radio, but his permission is not required in order that records or films which have been lawfully made of his artistic performance and put into circulation, may be used for public performance or broadcasting through the radio. It is further self-evident that, in the case of a personal public performance of a performing artist his permission is required for a *direct* radio broadcasting of his performance; no such permission is needed, however, for the public performance or radio broadcasting of artistic performances rightfully recorded for gramophones (in films) and put into circulation. There is no need to discuss here the cases in which the consent of the performing artist to a transmission of his performance over the radio may be taken for granted, owing to circumstances and common sense.

V. As according to the above the Rome convention does not deal with the right of the performing artist, and does not consider the performing artist as composer (author), Article 4 of the convention can therefore not be applied to the performance of the artist. Foreign artists, therefore, cannot refer to Article 4 of the convention.

The Hungarian Copyright Law—according to its correct interpretation—does therefore not require the permission of the performing artist for the public performance and radio broadcasting of gramophone records lawfully made and put into circulation and accordingly—lacking an international agreement to the contrary—it is of no consequence whether the performing artist is a Hungarian or foreign subject or whether the records were made in Hungary or in other countries. Accordingly, gramophone records made of the performance of foreign artists may be performed publicly in Hungary or broadcast over the radio without their consent.

In view of the principles outlined above, the defendant cannot rightfully protest, on the grounds that the performing artists assigned to him their rights in regard to their artistic performance, against the broadcasting in Hungary, without his consent, of gramophone records of artistic performances. Consequently, an inscription affixed on records by the defendant to the effect that broadcasting of the record without his permission is prohibited, puts the plaintiff under no legal obligation since there was no contract between plaintiff and defendant. Nobody can acquire extra-contractual rights against third persons by one-sided declarations if there are no rules granting him such right.

VI. As regards the defense of the defendant based upon unfair competition, the view of the Royal Court is correct that, although the plaintiff collects a fee from his subscribers, he does not compete with the defendant, in

the latter's capacity of producer and distributor of the records, by the broadcasting of gramophone records through the radio. Since, according to the above, the plaintiff has the right to broadcast through the radio the sound records put into circulation by the defendant, without the permission of the latter, there can be no question of any unfair competition on the part of the plaintiff by such broadcasting.

VII. Taking all this into consideration, the Royal Court correctly decreed that the defendant has no right to forbid the broadcasting through the Hungarian Radio of sound records put into circulation by him and to make their broadcasting dependent on his permission; further, that the inscription on the sound records forbidding their broadcasting through the radio has no legal effect against the plaintiff and the latter is not obliged to comply with the restrictive order. As the appeal of defendant was unsuccessful, therefore, the Royal Supreme Court orders the payment of the expenses incurred by the appeal according to Civil Law Procedure Articles 508 and 543.

Budapest, May 24, 1935.

(Signed) Dr. STEPHEN OSVALD, Chief Judge of the Royal Hungarian Supreme Court; Dr. DESIDER ALFOLDY, Master in Chancery; EDWARD ULRICH, Dr. RALPH LUDWIG, Dr. JOSEPH BRANDT.

## BOOK REVIEWS AND NOTES \*

*Liberia in World Politics.* By Nnamdi Azikiwe. London: Arthur H. Stockwell, Ltd., 1934. pp. 406. 7s. 6d.

This volume contains a highly documented account, bristling with footnotes, of the contacts of the Republic of Liberia throughout its history, with European nations and the United States. Some contacts have arisen in the adjustment of boundary controversies with neighboring colonies, though these are barely noticed in this volume. Those that receive attention are foreign loans with ensuing customs control, and intimately associated with such loans concessions under more or less onerous conditions to nationals of other countries, and finally demands made from time to time by individual Powers and by the League of Nations that Liberia should live up to what are claimed to be the responsibilities of modern statehood.

For the complete understanding of the issues raised in a long series of squabbles with foreign Powers, a knowledge of internal conditions in the Republic is essential. Some indications are given in the introductory chapters. One who knows the country from personal observation cannot but feel that the things left unsaid are quite as important as those which are said. It is true that in the subsequent chapters, where detractors of Liberia are allowed to speak their piece, many phases of the general backwardness of the nation clearly appear, but they are not shown as basic facts for the interpretation of Liberian history but are associated with the calumny which the author believes has been heaped upon the nation.

In recounting the long story of the facts and incidents which have led some to describe the Republic as a failure, and many to suggest that its inhabitants would be far better off if under foreign administration as a colony or a mandate, the author strives to be impartial. Though imbued with the idea that the Liberian Government is responsible in its actions to the Liberian people alone and to no one else, in his discussion of the various controversies he gives ample space to the critics of Liberia at home and abroad. He is at pains to refute them and marshal the facts that show even the most extravagant strictures to be in the wrong.

The chief interest of the volume lies in presenting in full detail the relations of the Firestone project to the affairs, local and international, of the Republic, as well as the lugubrious experiences of Liberia as a member of the League of Nations, particularly in regard to the complaint of slavery in the Republic.

The writer deplores that out of these controversies has developed in

\*The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—Ed.

Europe and the United States a spirit of hostility towards Liberia, a questioning of its policies, and a tendency to active interference in what the author considers the domestic affairs of the country. So long as the independence of Liberia is recognized by other nations, he feels that it should be left free to develop as it may, or indeed to go to the dogs, if that is its ultimate destiny, in its own way, and fortifies his position by copious citation of authorities on international law. Needless to say, he envisions a bright future for the little black republic and, like so many before him, pleads that it be given a chance to work out its own destiny without foreign interference.

ROLAND P. FALKNER

*British Year Book of International Law, 1935.* London: Humphrey Milford; New York: Oxford University Press, 1935. pp. vi, 248. Index. 16s.; \$6.00.

The sixteenth issue of *The British Year Book of International Law*, published under the auspices of the Royal Institute of International Affairs, contains a fine portrait of the late Professor Alexander Pearce Higgins, with a record of his life and work by Arnold D. McNair. The current issue follows the same admirable plan of organization as its predecessor and supplies us with valuable notes and discussions of the events of international importance which have occurred during the year. The literature of international law is covered by reviews of a selected list of works published in 1934 and by a systematic bibliography of books and important articles.

The articles on public international law include: "The 'Pure' Theory of International Law," by J. Walter Jones, and "The Retroactive Effect of the Recognition of States and Governments," by J. Mervyn Jones. Likewise of interest in the field of international law are the articles devoted to the League of Nations and the International Labor Office: "The Independence Granted to Agents of the International Community in their Relations with National Public Authorities," by Jacques Secretan, "The Relation between Membership of the League of Nations and Membership of the International Labour Organization," by C. W. Jenks, "The Effect of Withdrawal from the League upon a Mandate," by Quincy Wright, "The League of Nations and Refugees," by Norman Bentwich, and "The Members of the League of Nations," by Manley O. Hudson. Conflict of laws or private international law is treated in two articles: "Delimitation of Right and Remedy in the Cases of Conflict of Laws," by A. Mendelssohn Bartholdy, and "Some Defects in the English Rules of Conflict of Laws," by J. G. Foster.

It is interesting to note in the article on "The Retroactive Effect of the Recognition of States and Governments," that the author reaches the conclusion: "In any event there is no rule of positive international law that recognition is retroactive." An article by Jacques Secretan considers "The Independence Granted to Agents of the International Community in their Relations with National Public Authorities," and in conclusion expresses the

hope that "it will prove possible to reconcile the two principles which are at first sight in fundamental contradiction with each other, the principle of the national allegiance of these agents and the principle of granting to them these immunities, even in their relations with the state of which they are nationals."

ELLERY C. STOWELL

*Franz Joseph and Bismarck. The Diplomacy of Austria before the War of 1866.*

By Chester Wells Clark. Cambridge: Harvard University Press; London: Humphrey Milford, 1934. pp. xviii, 635. Index.

In this volume Professor Clark has broken new ground and has presented in a scholarly and convincing manner many new viewpoints with reference to the diplomatic relations between Prussia and Austria in the critical period from 1864-1866. On the basis of archival materials hitherto inaccessible to historians he has shed important light upon the plans of Bismarck for Prussian aggrandizement. Bismarck well realized that the Schleswig-Holstein question could be utilized as an effective means for provoking war with Austria, and with the Prussian war machine in perfect readiness, the result was inevitable. The successive steps taken by Bismarck to bring about the Austro-Prussian conflict are treated with a wealth of detail, but Professor Clark has enlivened his narrative by touches of color that make his monograph easy reading. Indeed, there are few historians who have caught the cadence of a readable historical style with the same assurance and success that are revealed in this study.

Although Professor Clark marshals a mass of evidence to prove that Bismarck definitely sought war with Austria and deliberately planned towards that end, he also indicates that Bismarck desired war only because he believed that through war alone could Prussia win unquestioned primacy among the German States. Such a position would be but a prelude to the establishment of a German empire with a Prussian king for Emperor, and this consummation would fulfill the dreams of millions of Germans who were weary of the long wait for a Germany that was no longer a mere geographical expression. For many years Bismarck had ardently hoped to find adequate political expression for this long-felt desire for German unity, and his decisive rôle in plunging Prussia into a successful war he regarded as preëminently patriotic.

Professor Clark has made a definite contribution to the literature on European diplomacy, and it is to be hoped that his next volume will treat with equal skill and complete understanding the troublous period from 1866 to 1870.

CHARLES C. TANSILL

*The Great Wall Crumbles. An Account of China Today.* By Grover Clark. New York: Macmillan Co., 1935. pp. xx, 406. Index. \$3.50.

Mr. Clark sets himself a most difficult task—that of interpreting China, in the successive stages of her historical development, to the "general

reader." His title covers especially the latter half of the book, in which he explains the gradual disintegration of the wall of Chinese isolation from the "Opium War" to the Amai Statement of April, 1934. The earlier pages concern themselves with the character of Chinese civilization, the establishment of the "Wall," both literally and figuratively, and the attitudes of the Occidental and the Oriental toward each other. Although interpretation rather than the writing of factual history is the author's aim, he gives sufficient attention to events to provide a satisfactory continuity. His discussion of the Republican era includes material not hitherto published.

The book is impressive in its revelation of the author's solid grasp of sociological aspects of Chinese culture. He is able to think as the Chinese think, to feel as they feel. Excellent also is the discussion of the changes that are now in process in agriculture, business, industry, education, transportation, etc. In these sections Mr. Clark is writing what he has seen and felt as an editor and teacher in China.

Although the author's main purpose is the clarification of Western thinking he is also deeply concerned with the trend of Chinese thought. He explains in vigorous and vivid terms the successive phases of that thought as it has been affected by imperialism, missionary propaganda and the failure of the League of Nations to function effectively against Japan. Apparently he does not contemplate the permanent acquiescence of the Chinese people in Japan's program of hegemony. China, though disintegrating, is also reintegrating. "Whether that reintegration will be around dependence on coöperation or on arms in international relations is for the West to say." In the latter case "the West itself and the resurgent Far East will be destroyed together in the clash of the forces and ambitions which the West has evoked."

HAROLD S. QUIGLEY

*Problems of the New Cuba.* Report of the Commission on Cuban Affairs. New York: Foreign Policy Association, 1935. pp. xiv, 523. Index. \$3.00.

This volume, the composite production of the Commission on Cuban Affairs, a distinguished group of specialists, is a much more pretentious and comprehensive work than the usual publication of the Foreign Policy Association. Twenty-one chapters cover the several topics which the committee proposes to discuss. Chapter I, "The Revolution," is a critical discussion of the course of Cuban development under the Republic, particularly under Machado's régime, when the defects of the system "came to a culmination." Black as the picture is, the Commission sees rays of hope for a reconstruction plan, due to the present "widespread and deep-rooted demand for social change," to the assets of Cuba—her favorable climate and her great resources—and to the new policy of the United States toward Cuba. Subsequent chapters are devoted to assembling "from all available sources the relevant facts of Cuban life" and outlining "certain possible solutions for the principal

economic and social problems of the country." Under these headings are embraced such factors as population elements, economic life, and family organization; social features, as public health and education; social unrest and labor questions; the sugar industry in its several aspects; and problems of money and finance, with a proposed "immediate program of relief" and more specific and detailed recommendations for a soil and forestry program, land colonization, and economic diversification, and finally, a brief but thoroughly important chapter of "summary and conclusions."

In its study, the Commission has made use of wide and varied materials: books and articles, government reports, and personal investigation are the chief bases upon which the volume has been built. Unfortunately, no formal bibliography has been presented, the reader being compelled to rely upon the extensive footnote citations, but seemingly the Commission has well-nigh exhausted all the available published works and statistical compilations.

The information presented by the authors is at times quite startling, if not shocking, and serves to explain in no small measure the economic and social roots of the revolutions in Cuba, as well as those of other Hispanic-American countries. No government can be stable when the great masses of its people have an average of but \$0.129 a day for food. Not only was this the situation in Cuba in 1933-1934, but one third of her families actually "spent less than \$0.10 per day for food per adult"! These and other statistics presented by the Commission are of infinite value to an understanding of the basic causes of unrest in Cuba. Nor are such conditions merely by-products of the sugar collapse. To quote the Commission, "Although improvement in the price of sugar may lead to increased wages, it will not provide permanent all-year-round employment." Concentration upon sugar production in the past has meant an extended dead season, with several hundred thousand Cubans out of employment. "The most immediate problem of the Cuban government is to develop new sources of income and living for this population." The immediate solution lies in sustenance farming, but for long-range benefits fundamental reconstruction is essential. Therefore, the Commission recommends that a soil survey of the several regions of the island be undertaken to determine the best uses to which lands may be put and that there be planned a thoroughly diversified agricultural economy which can release the country from its abject dependence upon the world sugar market.

*Problems of the New Cuba* is a profound and far-reaching study which promises to stand in the front rank of Cuban bibliography for a long time to come—a serious and on the whole successful effort to present clearly and exhaustively the significant problems confronting Cuba today and to make carefully weighed recommendations for their solution.

LEWIS W. BEALER

*La Ratification des Traités. Essai sur les Rapports des Traités et du Droit Interne.* By Fernand Dehousse. Paris: Recueil Sirey, 1935. pp. 222.

After deriving certain general characteristics of the formality called "ratification" from an analysis of the etymological background of the term, the several definitions propounded by publicists, and the differences between ratification and adhesion, M. Dehousse undertakes to determine the place and function of ratification in the procedure of treaty-making. That entails an examination of the entire procedure from negotiation and signature to promulgation and registration, with a discussion of the juridical effect of each step involved and of the state organs which perform them. That, in turn, involves at several points the question of the relationship between treaties, or international law, and municipal law, and considerable space is devoted to outlining the dualist and monist views with respect to that problem. The author defends the monistic theory of the unity of the juridical order and the supremacy of international law. International law, he concludes, delegates to each state authority to determine by municipal law the organ competent to exercise its treaty-making power. A treaty made in violation of constitutional provisions relative to the treaty-making power is, therefore, void; a treaty made in accordance with such provisions, however, is internationally binding even if in conflict with other parts of the constitution. Other matters, such as the presumed necessity for ratification, the right to refuse ratification or to ratify conditionally or with reservations, forms of ratification, non-retroactive effect of ratification, the supremacy of treaties over conflicting laws, and the proper sanctions for treaty violation, are likewise discussed. A brief but well-selected bibliography concludes the volume.

M. Dehousse has based his discussion almost entirely upon the doctrine of continental writers and upon European practice, frequently as it is reported in secondary sources. Likewise, accepting the classification of international agreements proposed by Bittner and Basdevant, he has in this volume considered only "treaties properly so-called." Within these limitations he has produced a stimulating, if sometimes inconclusive, study of a number of important questions in the law of treaties which is deserving of the attention of anyone interested therein. VALENTINE JOBST III

*La Clause "Dollar-or." La non-application de la législation américaine aux emprunts internationaux.* By Martin Domke. Paris: Éditions Internationales, 1935. pp. 100.

Dr. Domke continues in the present monograph his previous discussion of the rights of foreign bondholders. In 1934 he published a monograph showing the need of an international institution for their protection (reviewed in this JOURNAL, July, 1935, p. 556). In the present work he deals with the rights of foreign holders of dollar bonds payable in gold. His principal thesis is that the judgments of the Supreme Court of February 18, 1935,

upholding the validity of the Joint Resolution of Congress and annulling the gold clause do not affect rights of holders of bonds payable in gold dollars issued by non-American debtors, nor the obligations of American debtors upon such bonds payable in foreign countries. He cites in support of his thesis not only the well-known cases decided by the World Court relating to the external bonds of Brazil and Serbia, respectively, but also decisions of municipal courts in Great Britain and the United States and in countries of Continental Europe. His arguments are forcefully and clearly stated. Occasionally, however, his conclusions seem somewhat strained. For example, he maintains that because the Joint Resolution was adopted in the general monetary interest of the United States, "to insure the uniform value of the coins and currency of the United States," and because the government discarded the gold standard voluntarily, and without being forced to do so, one may conclude that the law was only intended to affect debts payable within the United States (pp. 71-72). While endeavoring to support his main thesis, Dr. Domke is fair enough to present the arguments of "statecraft" opposed to the ethical obligation of the gold clause. Thus he quotes Nussbaum to the effect that it seems to a certain extent unavoidable "to weigh legal rights in the balance of economic and social justification" (p. 25). Dr. Domke's thesis may properly be described precisely in converse terms; for he endeavors to prove that it is unavoidable to weigh economic and social measures in the balance of legal rights.

ARTHUR K. KUHN

*Les Actes de Gouvernement.* By Paul Duez. Paris: Recueil Sirey, 1935. pp. 215. Fr. 40.50.

Starting from the proposition that the increasing importance of the judicial function has been an outstanding characteristic of public law in the twentieth century, M. Paul Duez, Dean of the Faculty of Law at the University of Lille, proceeds to develop a valuable study of those limitations upon the scope of the judicial function which are classified as *les actes de gouvernement*. Following some introductory or preliminary matter on the rôle of the judge and the characteristics of the *acte de gouvernement*, the author presents a fairly comprehensive summary of French law and practice. He concludes first, that the *acte de gouvernement* has been a jurisprudential creation, without real foundation in any statutory texts; second, that being unable to find satisfactory criteria, jurisprudence and doctrine have had recourse to definition by enumeration; third, that the *acte de gouvernement* rests upon a purely political foundation and does not admit of accurate juridical analysis; and fourth, that there is not a homogeneous body of substantive practice, that the tendency is toward further restriction, and that this tendency may be expected to continue, especially at points where the underlying justification is weakest. At this point, the author turns to a comparative study, dividing the countries selected into three groups:

(1) the group influenced by French practice, especially Italy, Rumania and Belgium; (2) the Germanic group, Germany and Switzerland; and (3) the Anglo-Saxon group, England and the United States. The monograph concludes with a well-organized argument for further restrictions upon, or the complete suppression of, the *acte de gouvernement*. The argument for suppression, it should be said, is really an argument in favor of the substitution for the *acte de gouvernement* of the principle of reserved discretionary power.

The author's principal concern throughout is the French law and practice. Systematic and lucid presentations of the backgrounds of French doctrine, of the contemporary French practice, and of the trends of development constitute the most useful portions of the monograph. M. Duez regards the *acte de gouvernement* as preëminently a French conception and accepts Dr. Laun's dictum that "*la théorie de l'acte de gouvernement cessera automatiquement dans le monde entier lorsque la France en aura reconnu l'inopportunité.*"

The review of doctrine in Italy and Germany seems a bit academic, in view of recent developments in those countries. The treatment of the subject for countries other than France is of necessity brief and somewhat superficial. One wonders, in passing, whether there is possibly more of similarity between the *acte de gouvernement* and the act of state in English law (p. 153), or the doctrine of political questions in the United States (p. 160), than the author is willing to concede. Indeed, M. Duez's excellent monograph is in some respects a tantalizing introduction to the larger problem of the delimitation of judicial from political power, a problem of perennial interest to international lawyers.

EDWIN D. DICKINSON

*The Legal Position of the Holy See before and after the Lateran Agreements.*

By Mario Falco. Translated by A. H. Campbell. New York: Oxford University Press; London: Humphrey Milford, 1935. pp. 46. \$1.00.

It was doubtless to be expected that the conclusion of the Lateran Agreements of 1929 would give rise to considerable discussion on the part of jurists as to the exact legal nature of the City of the Vatican. For all that, the lectures reprinted in this brief pamphlet will come as a surprise to those unfamiliar with the subtleties of juristic abstraction. Who could believe that so many theories could arise to explain so small a state? Who could have anticipated that scholars would labor so hard to find a category in which to place an institution which quite obviously to the Anglo-Saxon mind was a category by itself? Who could have thought it necessary to distinguish and subdistinguish in order to justify the legal character of an institution which has apparently gone on its way much the same after the Lateran Agreements as it did before? Professor Falco quotes Mussolini as saying that the treaty would become "the delight of the commentators." Apparently they were to be allowed full freedom of discussion in that field.

Nevertheless Professor Falco has presented a great deal of interesting

political theory in a small compass; and even if it is difficult to follow him at all times in his distinctions it is an exercise of dialectics to see which of the various solutions offered for the problem is to win out in the end. The first lecture is devoted to the status of the Papacy in the years succeeding 1870; and the author, after a review of juristic theories, comes to the conclusion that it would be a grave error "to think that the Papal State still enjoyed legal existence at the moment the Lateran Treaty was concluded." The destruction of the Papal State in 1870, however, left the Holy See a sort of "quasi-international-law subject"; and while the author finds it "impossible to attribute legal personality in international law to the universal Church," yet he is able to conclude "that between 1870 and 1929 the Holy See possessed, as it had possessed before, legal personality and sovereignty in the international sphere."

"What is the legal nature of the Lateran Treaty?" To this question the second lecture is devoted, and the chief difficulty is to explain how a true international state could come into existence by an agreement with an institution which up to that time was merely a legal person of Italian municipal law. Can an agreement be a treaty if it is not concluded between two states? Perhaps the Vatican City, which was not a state when the negotiations were begun, became a state at the moment of the exchange of ratifications? But can a state come into existence by an agreement which necessarily assumes its existence? To solve these questions Professor Falco abandons "the dogma that an international treaty can be concluded only between states" and turns to the fact that the Pope already possessed an international personality with which the Italian state could contract. The contract created the new state, and that is all there is to it.

Since its creation the character of the Vatican City as a state has been questioned "by a whole series of writers" on the ground that it lacks the essential elements of territory, "people," and "state power." But all these objections can be admitted, says the author, and yet the Vatican City is, "according to scientific classification," a state because of its possession of "an original underivative sovereignty." This legal situation is reconcilable with the acceptance in "a historical and realist sense" of the "drastic phrase" uttered by Mussolini on May 13, 1929, that "We have not resuscitated the temporal power of the Popes. We have buried it."

A concluding note on an article by Professor Schoen in the *Zeitschrift für öffentliches Recht*, 1934, suggests that German jurists can be as subtle as Italian when it comes to reconciling abnormal situations with normal law.

C. G. FENWICK

*The First American Neutrality: A Study of the American Understanding of Neutral Obligations During the Years 1792 to 1815.* By Charles S. Hyman. Urbana: University of Illinois Press, 1934. pp. 178. Index. \$2.50.

This penetrating and well-written book presents in brief compass and with

admirable clarity the record of the performance of neutral duties by the United States during the Revolutionary and Napoleonic Wars. Dr. Hyneman has brought to light important new material from the archives of the Department of State and the Treasury Department, and has made good use of the transcripts procured by Henry Adams of the correspondence of the British ministers accredited to the United States. The author asserts this to be "the fullest account in print of the attitude of neutral and belligerent nations on several issues of importance to the participants and onlookers in time of war. For example: Should the pledge to strict impartiality override prior and conflicting treaty promises? May a nation embark on reprisals toward a belligerent while asserting a status of neutrality? What degree of impartiality in speech and conduct is exacted of the statesmen and other public officials of the neutral country?"

Dr. Hyneman's account of the origin of our policy as to neutral duties is briefer but more trenchant than that given in Professor Charles M. Thomas's *American Neutrality in 1793*. In placing each problem in its contemporary setting he has paid more heed than his predecessors to the precedents for American action. He maintains that there was no obligation upon the United States in 1793 to pursue a course of impartiality, and that President Washington and his Cabinet were influenced primarily by the wish to further the commercial fortunes of the Republic. Without withholding a due meed of praise, he questions whether the neutral policy of the United States deserves to be recognized as the first neutrality to maintain so high a standard, unless it can be shown that the neutrality edicts which were issued from 1778 to 1779 by the Italian States were not enforced. This stimulating survey of international law in the making is most timely at a moment when important modifications of our historic neutrality policy are under consideration.

JAMES P. BAXTER, 3RD

*The International Protection of Labor: International Labor Organization, History and Law.* By Boutelle Ellsworth Lowe. New York: Macmillan Co., 1935. pp. lxxiv, 594. Index. \$3.50.

For a number of years Professor Lowe has been recognized as one of the pioneers in the English language in the historical background of the international labor movement. The present volume is a revision and enlargement of his work of the same title which was published in 1921. The book deals with the beginnings of the idea of international labor protection early in the nineteenth century, and traces the insistent demands of socialists, trade unionists, government leaders, welfare workers and others that labor be protected internationally.

The primary value of the work is the collection of documents which it contains, such as the bilateral labor treaties before 1914, the action of various congresses, official and otherwise, which before the war asked for the international protection of workers, and the draft conventions and recommendations adopted through 1934 by the International Labor Conference. The

student of labor legislation will, no doubt, be more interested in this work than those who are following the course of post-war international law and organization.

It may be unfortunate that the author has not devoted more attention to international labor organization, and to the developments in this field during the last fifteen years. Certainly, the work of the International Association for the Legal Protection of Labor and the American Association for Labor Legislation is valuably discussed by the author, and many who want to trace the development of international action for the benefit of workers will be drawn back to the volume. But after 1919 the chief emphasis of the work falls on the content of draft conventions and recommendations which have been adopted by the Geneva Labor Conference. This method explains labor standards but it does not discuss them in their functional setting.

FRANCIS G. WILSON

*Peace With Honor.* By A. A. Milne. New York: E. P. Dutton & Co., Inc., 1934. pp. 219. \$2.00.

In writing this book Mr. Milne has not subtracted from his reputation of being one of the most popular and beloved authors, not only in England but throughout the literary world. To start reading these eighteen short chapters means to finish them, probably in a single sitting. Written primarily for the people of Europe, their appeal is universal.

Here and there are statements with which, taken by themselves, it would be absurd to agree. To say that "Every argument between two people is liable to sink or rise to the level of a dog-fight," is of doubtful validity; yet it is probably true that "Wars may be declared for economic reasons, but they are fought by volunteers for sentimental reasons." It is also probably true that if we human beings are to stop wars, "We need not be saints. It will be enough if we stop being criminal lunatics." Again, "Universal peace will demand many sacrifices. It will demand the sacrifice of a great deal of traditional nonsense. But it will not demand the sacrifice of ten million lives." What he has to say about patriotism is a bit loose in places, but it is not dull. Indeed there is not a dull page in the book.

He calls upon all the nations to take an oath to renounce not only aggressive but defensive wars and to submit all disputes to arbitration, the oath to be taken in the first place by the leaders of the countries, and then by the people individually; all with the understanding that no person is to be released from his oath by reason of another person's default. Such a renunciation must be universal, of course; but since it will be agreed to at first by a few representatives only, it cannot be said to be impossible. The author has no trouble with the word "security." He calls for a security that flows from "a country's honor: a moral force which has never yet been allowed expression."

Mr. Milne appeals to *all* our humanity, *all* our intelligence, *all* our honor, and hence cannot expect to be elected to any job of practical international importance.

ARTHUR DEERIN CALL

*La Neutralité et la Paix.* By Nicolas Politis. Paris: Hachette, 1935. pp. 229.

This volume, by the distinguished Greek Minister to France, is an attack upon the doctrine of neutrality, as inconsistent with the "collective" system of "enforcing peace." Like many European tracts of this character, it is largely addressed to the United States. Neutrality, in the author's view, is not only an anachronism, but it is immoral, impractical, an obstruction to the organization of international solidarity. War is now a crime against mankind, and he who stands aside from the struggle to down the criminal is a cowardly participant in the crime. The theologians like Vittoria, says M. Politis, laid the foundation for the view that war presents a struggle of good against evil, and that it was proper to aid the right and trip up the wrong, a concept which finds its inspiration in the Holy Crusades. Force in behalf of righteousness only is proper. That was the theory of Grotius' distinction between just and unjust war. But the theories of that day (which never worked in practice), lacked, according to the author, the crowning achievement of an authoritative method of determining who was the aggressor, a defect which has now been cured by the establishment of the League of Nations. The Covenant of the League has largely abolished neutrality because it has largely abolished war. But not all wars, for some are still licit. Possibly for these a slight concession must still be made for neutrality. Those who remained detached from the last World War, and who would not pick an aggressor, assumed a heavy responsibility for the continuation of the war, and are taxed with "profound immorality" (p. 96). This will be pleasant news for Holland, Switzerland, Spain, and the Scandinavian countries. Whereas neutrality used to be a symbol of peace, it has now *mirabile dictu* become an obstruction to peace. It is no longer a good, but an evil (pp. 72, 97). The Pact of Paris gave neutrality its *coup de grace* (p. 179). It stands condemned. The United States' attachment to neutrality, says M. Politis, has enfeebled the League of Nations and has impaired the progress of international organization. The United States is now morally, if not legally, bound under the Pact of Paris to help down an aggressor or violator of the Pact and employ sanctions. The "just war" establishes freedom of the seas for the righteous, so that Great Britain has now made the doctrine of the freedom of the seas its own, and asks if the United States will apply it to eliminate war (p. 149)!

But not all the propositions in the book are unsound and unsustainable. The author is too astute a politician not to appreciate that the world of reality has not supported his lovely theories. He is deeply under the influ-

ence of the propaganda of the "Crusade" of 1914. The author's best work lies in tracing in broad strokes the development of neutrality since the 14th century, and the difficulty of establishing the legal right of a country to stay out of foreign war, with definite legal relations to the belligerents. He shows that the effort to circumscribe belligerent operations was a boon to the world, but the very fact that belligerents so outraged neutrals in the last war is, for M. Politis, not a cause for condemnation but evidence of the fact that neutrality is over. Thus, unless M. Politis can guarantee that the last war to end war has been fought, a free hand to belligerents seems to be the new road to peace—a curious result. Even if this conclusion is theoretically tempered by the author's fiat that hereafter force can only be used on the part of the collectivity, it puts an awful strain on a major premise. Neutrality was strong from the 16th to the 19th centuries, M. Politis thinks, because the doctrine of state sovereignty was then so highly developed, but with the disappearance of state sovereignty, which he thinks he sees, international solidarity leaves no place for neutrality. On page 179 we find, however, this revealing passage: "In law neutrality has then ceased to be an institution. But the law is here in advance of habits, of beliefs and of facts." What kind of "law" can that be, except a visionary dream? M. Politis deprecates the Rio de Janeiro Anti-War Treaty of 1933 and the Havana and Montevideo conclusions that if war should break out on this continent, the non-belligerents will observe a strict neutrality. He thinks they all ought to join hands and arms against the aggressor. The United States is very remiss, he concludes, in not appreciating the beneficence of this system of "enforcing peace." But he is not hopeless. He thinks the Norman Davis commitment at Geneva in May, 1933, promises the ultimate abandonment by the United States of its selfish neutrality, and its early association with the rest of the enlightened world in exterminating aggressors—all in the name of peace and the good life.

What our learned author seems to overlook is the fact that the world is not built along the lines envisaged by his mind's eye. It is a quite different structure. He does not pay much attention to the fact that every time the sanctions bag has been opened, the fumes released have poisoned the atmosphere, and that it has proved in practice worse than a failure—indeed, an unmitigated danger to general peace. The truly operative causes of war he leaves out of account. There is no apparent disposition in any important countries to lay the foundation indispensable to his abstract structure, namely, the elimination of national sovereignty in armaments, tariffs, and the unfair competition which now more than ever characterizes international relations. The fate of the Disarmament Conference does not abash our hopeful author; he leaves it practically unnoticed.

In a world in which the *status quo* has been created by the use of force, with maldistribution on every hand, it is disingenuous to assume that anyone who tries to upset it is a moral pariah. The arrangements of 1919 are a

standing incentive to despair and an invitation to revolt. Far sounder is the view of another theologian, as presented in the following quotation:

This harmonizing of national policies must deal with fundamentals; with the things that have commonly caused wars. The moral right to keep on possessing the best regions of the earth is directly balanced by the right to fight (for) and capture them. It is amazing that so few people will admit this axiom of international morality. Popular opinion is widely befogged in the more comfortable countries by the childish notion that an aggressive war is wicked but a defensive war is righteous. They are, of course, precisely equal in moral quality, so long as war is the only adequate instrument by which vested wrongs can be righted and national needs supplied. The next rational step toward a tolerable world peace would be the broadcasting of this truth throughout Great Britain, France and the United States. It is already familiar to the peoples of Germany, Italy and Japan.<sup>1</sup>

The aggressor concept, if honestly entertained, is, in the reviewer's opinion, unsound, and "aggressive war" even less tolerable. It is part of the psychosis of 1914, which the world has not yet shaken off. As for "collective security," that also I venture to consider a myth, serving much the same political purpose the Holy Alliance was intended to serve. Why Americans should embrace these schemes for the perpetuation of an unhealthy *status quo* in the name of the higher morality, or subscribe to war in the name of peace, surpasses the reviewer's understanding. And when Europe admonishes the United States for its lack of enlightenment and asks, "Shall the United States participate in collective action to prevent war?" we ought to know, as so competently demonstrated by Frank H. Simonds in the *Saturday Evening Post* for August 17, 1935, that the real question is, "Shall the United States join the next war?" Many European politicians cannot bear the thought of a negative answer to that question, hence the determined and relentless effort to break down American neutrality in the name of sentiment, morality, fate, expediency, politics, or any other consideration that will serve the purpose. It is part of the price we are paying for 1917.

EDWIN M. BORCHARD

*La Doctrine de la Guerre Juste de Saint Augustin à Nos Jours.* By Robert Regout, S. J. Paris: A. Pedone, 1935. pp. iv, 342. Index. Fr. 50.

It was but natural that the physical and moral upheaval caused by the World War and the establishment at its close of new agencies for the maintenance of peace should lead moralists to examine anew the principles upon which they had been led previously to determine the justice or injustice of a war waged by their country. Catholic moralists, with long traditions behind them, have perhaps more than others felt called upon to reconcile the teachings of the great theologians of the past with the possibilities inherent in a closer organization of the nations and in the wide variety of recent

<sup>1</sup> Henry W. Lawrence, "Peace costs too much," *Christian Century*, Oct. 10, 1934, p. 1279.

treaties looking to the arbitration of disputes and the assurance of mutual protection. In consequence a number of volumes have appeared of recent years devoted to the exposition of the writings of Catholic churchmen upon the subject, the latest being a detailed and scholarly work by a Doctor of Law of the University of Leyden.

In its survey of doctrine from the time of Saint Augustine to the present day Dr. Regout's volume follows the general lines of Vanderpol's pioneer volume, *La Doctrine Scholastique du Droit de Guerre*, to which the present author pays tribute while taking exception to certain of its conclusions. Fundamental principles are set forth, for the most part in the exact words of the original writer. These citations, added to those to be found in Vanderpol, will prove of great value to the student, especially as Dr. Regout is careful to place them in their setting and thus makes clear the qualifications with which they are to be taken. What distinguishes the present volume from that of Vanderpol is the care with which the author has undertaken to show the development of doctrine from writer to writer and the consistency of teaching which he believes to exist even where there appears to be inconsistency. Vanderpol believed that he had found in the teachings of the theologian-jurists of the sixteenth century divergencies from the traditional doctrine of what constitutes a just war; he saw a tendency to accept the principle that a war can be just on both sides at once, a tendency to introduce considerations drawn from probabilism, the consequences of which were fatal to the correct application of the principles of the earlier writers. This interpretation of Vanderpol is strongly criticised by Dr. Regout, who makes it one of the chief objects of his study to show the consistency of the teachings of the sixteenth and seventeenth century writers with those of medieval times, notwithstanding differences of approach to the problem dictated by changes of circumstances.

While Dr. Regout's study is chiefly concerned with an analysis and interpretation of the historical succession of theories with respect to a just war, he is not unaware that although the principles laid down by the theologians and canonists were valid for their day there were serious weaknesses in them which kept them from playing an important rôle for the prevention of war and the maintenance of peace. The outstanding weakness was of course the fact that when controversies arose each state was the judge in its own case both as to the grounds of war and as to the measure of reparation due to it if victorious in the conflict. In consequence the author is led to emphasize the fact that for the successful application of the principles governing a just war an international organization is necessary by which the community of nations at large may be at once the judge of the controversy and the one to apply the sanctions of the law. In the presence of this conception of an international community the doctrine and the practice of absolute sovereignty must give way. The author then recurs to the condition prerequisite to a just war after all others have been met, namely,

that there be no other means for obtaining redress. Now that there are other means, in the form of arbitration, judicial settlement and the League of Nations, they must be resorted to; and to that extent the traditional principles must receive a new application.

The volume is introduced by a brilliant note from the pen of the distinguished scholar, Yves de la Brière.

C. G. FENWICK

*Amendments of the Covenant of the League of Nations Adopted and Proposed.*

By Grace Evans Rhoads, Jr. Philadelphia: 1935. pp. 201.

This study is a doctoral dissertation presented at Bryn Mawr College. The author discusses the amendments already adopted and those that have been proposed. There is a six-page bibliography. The amendment clause of the Covenant (Art. 26) deals with the matter of ratification of amendments but says nothing of initiating them. In practice the League members have followed the procedure of casting proposed amendments in the form of protocols to differentiate them from the usual resolutions of the Assembly. The various points of amendment procedure are discussed in detail. To take the place of formal amendments, use has been made of interpretations<sup>1</sup> and supplementary agreements such as the Locarno treaties, the General Act of 1928, etc. Interpretive resolutions are difficult to obtain and may be modified without warning. Supplementary agreements may divide the membership of the League into signatories and non-signatories, thus marring uniformity.

The author concludes that the members of the League have taken most seriously the question of amending the Covenant. Experience has shown that "it is possible but practically very difficult to amend the Covenant." The "development of international society will probably require or at least render desirable a modification of the amendment procedure." Possible advantages might result from "a longer period for the ratification of amendments, and a provision for a three-fourths rather than a unanimous vote of the Council, including possibly all the permanent members of the Council."

The study brings together in convenient, well-documented, and readable form most of the facts and the problems regarding amendments.

J. EUGENE HARLEY

*Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten.* By Anton Roth. Berlin: Carl Heymanns, 1934. pp. 178. Index. Rm. 12.

This study has been awarded the John Westlake Prize of the Institute of International Law for 1933. The award is well merited. Dr. Roth has made a very scholarly survey of judicial decisions and authoritative writings

<sup>1</sup> At page 166 it is stated regarding Article 21 that "no official interpretation of the Monroe Doctrine has been attempted by the League." No reference is made to the letter of Costa Rica (July 18, 1928) requesting the interpretation of the League on the Monroe Doctrine and the telegram in reply (Sept. 1, 1928).

dealing with the nature and the extent of the compensation due by one state to another for damages suffered by private persons in consequence of acts of commission or omission constituting a violation of international obligations. The volume under review constitutes a serious contribution to this difficult and important problem, and will serve as a useful basis for further studies on the subject.

Dr. Roth's work is not purely descriptive. It aims at overcoming existing and avowed contradictions. It frankly emphasizes the principles which the author believes to be correct, and attempts to gain for them universal recognition. This "propagandistic" attitude might or might not please. The reviewer likes it. The submission of alleged violations of international law to a procedure of litigation is as yet a sporadic and by no means firmly-established phenomenon. The principles upon which tribunals, if entrusted with the controversy, base an award of compensation, are far from certain. In these circumstances, inconsistencies in their decisions are inevitable: indirect damages, moral damages, punitive damages, interest, compound interest, costs—should they or should they not form part of the compensation to be awarded? Decisions waver. Treaties are usually silent or vague. It is a writer's duty, in a case of this kind, to be constructive, not merely descriptive; to scan the practice for any signs of even approximate uniformity, to analyze the practice in the light of sound juristic doctrine, and thus to advance the matter, at the conclusion of his study, one step further in the direction of greater certainty and uniformity. That is precisely what Dr. Roth has done.

It should be noted, at the same time, that the author's survey of the practice is not entirely impartial. Here and there he overemphasizes a point, and gives the benefit of the doubt to an interpretation most favorable to his point of view. Inasmuch, therefore, as his conclusions are presented as inevitably following from prevailing practice, they should be taken *cum grano salis*. In common with most central European authors, Dr. Roth is also a bit too dogmatic, too certain that there is but one scientific truth, and that contrary opinions are necessarily erroneous. In other words, the volume under review is recommended as a stimulating piece of juristic construction, not as an authoritative statement of the law in force.

Dr. Roth holds that the concept of "compensation for damages" is a general concept of law and that it includes, along with direct material losses, indirect material damages (*lucrum cessans*) as well as moral damages and costs. Once international law has adopted the principle of liability for damages—and he believes this to be the case even in the absence of specific obligations to this effect—all these elements should be included in the award, provided there exists a close enough connection between each of them and the act violative of international law, and unless they are excluded by express agreements to the contrary. As for punitive damages and interest, they do not seem to him to form an essential part of the general concept of com-

pensation. In these conditions, he is willing to let the practice of states prevail. He finds this practice inconclusive as to the inclusion of interest and hostile to the inclusion of punitive damages.

The book contains numerous quotations from decisions, mostly reproduced in English or French. These quotations, and even the German text, suffer somewhat from misprints.

BENJAMIN AKZIN

*The Soviet Union and International Law.* A study based on the Legislation, Treaties and Foreign Relations of the Union of Socialist Soviet Republics. By T. A. Taracouzio. Foreword by George Grafton Wilson. New York: Macmillan Co., 1935. pp. xviii, 530. Index. \$7.50.

Here is a significant book of such excellence that the author should be allowed to summarize his aims and main conclusions.

*Aims:* "An evaluation of any legal system in the course of active development is a hazardous undertaking. This is particularly true as regards the impingement of Communism upon international law. . . . For these reasons the present study makes no pretense at approbation or censure of the Soviet attitude towards international law. Its object is rather to discover as far as possible the bases underlying the Soviet interpretation of the principles involved, and to disclose the degree and the fashion of their actual application in the international life of the U.S.S.R." (p. vii.)

*Communistic conception of international law:* "A provisional inter-class law which aims to further the interests of organized national laboring classes in their common struggle for proletarian world supremacy. . . . Thus for the Soviets the class self-consciousness of the ruling order is the fountain of international law."

*Communistic conception of the state:* "The Soviet State . . . can never assume the capitalistic rôle of a national authority representing 'solidarity' of classes. . . . As explained by Engels, a state *ipso facto* presupposes a communal authority which stands separately from the masses composing the community. In this sense, the state for a Marxist is . . . necessary for the regulation of class conflicts." (p. 15.)

"It is generally admitted by non-communistic authorities that the international personality of a state is not affected by changes in its social order or in its form of government. . . . For the Soviet authorities, this theory holds good only when the social or political revolution results in no change in the class structure of the state, be it from bourgeois to proletarian, or *vice versa*. Hence they claim that it can have no application to the Union of Soviet States." (p. 21.)

*Communistic conception of sovereignty:* "State sovereignty for the Soviets must be viewed as a paramount proletarian right for international social reconstruction manifested temporarily in national self-determination and class struggle." (p. 27.)

"The Soviet attitude toward sovereignty may be summarized as a conscious subjection of theoretical aspirations to concrete necessities. . . . In dealing with the international aspects of the problem, the Soviets are content to see it left in each individual case to the interpreta-

tion dictated by the political wisdom and diplomatic skill of the moment." (p. 46.)

*Summary:* "In spite of the fact that international disorganization might not be unwelcome to the Soviets, in view of their ultimate aims, in practice they find it advisable to disregard their theories and to admit the force of international rules established independently of communist ideals. . . .

"According to Marx the state is a struggle of classes, *i.e.*, a system of social relations, and the law is a phenomenon germane thereto. Furthermore, the state is bound to disappear upon the establishment of the classless commonwealth. Hence the law itself, as an integral part of the state, is bound to be overtaken by a similar fate. However, will social relations among men also disappear? If not, the state and consequently the law is bound to persist, contrary to the Marxian postulate. This anomaly is not adequately explained in communist literature, but it definitely presages the difficulty which the Soviets encounter in disposing logically with international law. . . .

"While for non-communists the importance of international law lies not only in its external and technical forms, but in its spirit and in the purpose for which it exists, for communists, significant in international law is its essential theoretical superfluity. Their practical application of its tenets is nothing but a diplomatic way of attempting gradually to remove this outstanding obstacle from the path of their revolutionary advance towards the stateless commonwealth, purposing to place it ultimately 'along with the spinning wheel and bronze axe, in the museum of antiquities.'" (pp. 348-351.)

The above excerpts may serve to indicate the nature of the contribution made by Mr. Taracouzio to the clarification of this immensely important problem of "the impingement of communism upon international law." The author has faithfully accomplished his task of basing his conclusions, not on opinions, but upon official statements, documents and acts of the Soviet Union. Of extreme value are the official documents listed in the twenty-four appendices (pp. 353-480).

The author has displayed great discrimination and objectivity in his detailed analysis of the theory and practice of the Soviet Union respecting international law under the chapter headings of Sovereignty, Territory, Persons, Diplomacy, Consular Service, Treaties, Pacific Settlement of International Controversy, and War. This analysis discloses but few divergencies in the Soviet interpretations of international law as accepted by non-communistic states. This, as the author has fully demonstrated, has been due to the practical necessities of the situation which compel a diplomatic accommodation of communistic theories with the actual exigencies of international intercourse.

To the student of international law as well as to practical statesmen the main interest of this volume must lie in its implications. It is hardly to be denied that the successful establishment of the Soviet Union upon what seems to be a permanent basis cannot but have far-reaching repercussions upon political theory and practice throughout the world. International law

is bound to be affected, particularly if other great nations should by any chance also become communistic. It would then be impossible to preserve intact the existing system of international law which is based upon principles fundamentally antagonistic to the principles of communism as expounded and practiced by the Russian-Soviet Union. We have here a challenge which we must be prepared thoughtfully and courageously to meet.

I venture to emphasize what seem to be the most significant lessons to be gathered from this remarkable volume. First of all is the evident belief of the Russian Soviet Government that the revolution which established the Soviet Union accomplished more than a change of government or a new political and social organization. It is claimed that the destruction of the czaristic system of capitalism put an end to the old Russia and created an entirely new state. It was on this principle that the Soviet Government attempted to justify its refusal to compensate foreign investors for the losses suffered as a result of the Decree of January 28, 1918, by which all foreign loans were repudiated. In this connection the memorandum of the Soviet delegation submitted at the Genoa Conference on April 20, 1922, takes on increased significance: "In refusing to take over the obligations of former governments, or to satisfy the claims of persons who have suffered losses caused by measures of domestic policy, the Soviet Government has so acted not because it was unable or uninclined to fulfill the obligations, but because of matters of principle, and because of political necessity. The Revolution of 1917 completely destroyed all old economic, social and political relations, and by substituting a new society for the old one, in virtue of the sovereignty of a revolting people, has transferred the state authority in Russia to a new (different) social class. By so doing it has severed the continuity of all obligations which were essential to the economic life of the social class which has disappeared."

In the light of this claim that a new political entity was created by the formation of the Soviet Union it is clear that the *de jure* recognition of the Union by other nations was far more than the recognition of a new government; it was the recognition not only of a new state but the recognition also of a new *kind* of state. What kind of state was created has been vividly indicated in this book on *The Soviet Union and International Law*. It should now be apparent that recognition has been accorded to a new political association which is at war virtually with the whole system of international law. We have thus the astounding paradox of a recognition granted according to the rules of international law which the new state impliedly repudiates under the Marxian concept of communism as professed by the Soviet Union!

The Soviet Ambassador to the United States, Mr. Alexander Troyanovsky, in an address delivered before the American Society of International Law at its annual banquet in Washington on April 28, 1934, stated that "International law is a collection of the rules directing the relations among nations. These rules are effective only insofar as the nations themselves accept them,

of their own will. . . . I think that only precise international treaties duly signed can give us an acceptable basis for international relations, and consequently for international law. . . . Public opinion, the press, statesmen, diplomats, must not spare their efforts to create coöperation of the Powers for support of existing international law in the form of signed treaties, and obligations, along with necessary changes of obsolete agreements." (*Proceedings of the American Society of International Law*, 1934, pp. 196, 197.) In the light of the exposition given by Mr. Taracouzio of the Soviet attitude towards international law, this statement by the official representative of the Russian Soviet Union in the United States is of profound significance. It is evident that the position of the Soviet Union is summed up by this pronouncement—that there can be no international law acceptable to the Union other than that embodied in formal agreements. Whatever else may be tolerated in practice is to be considered only as temporary concessions dictated by the diplomatic exigencies of the foreign relations of the Soviet Union with other nations during the period of transition of international society from a capitalistic basis to a communistic world order.

These and other considerations of like importance should compel all thoughtful students of international relations to read carefully and ponder conscientiously the extremely valuable analysis of this momentous problem so admirably presented in this scholarly volume.

PHILIP MARSHALL BROWN

*Das Problem der Grundrechte im Verfassungsleben Europas.* By Eduard Westphalen-Fürstenberg. Vienna: Julius Springer, 1935. pp. vi, 253. Rm. 15.

The subject-matter of this book, "the problem of fundamental rights in the constitutional life of Europe," is one to which international law is no longer indifferent. The concept of an international minimum standard of justice, and that, more particularly, of a certain minimum of individual rights the observance of which may be internationally expected and even urged, has found a secure place in the scheme of the law of nations. Anti-slavery conventions, humanitarian interventions, and the international protection of minorities—at first sporadic, but organized since 1919—represent the international practice in this respect. Among the theoretical efforts moving in the same direction one should note particularly Borchard's work on *Diplomatic Protection of Citizens Abroad* and the studies made by Lapradelle and Mandelstam, under the auspices of the Institute of International Law, on the "international rights of man." Within recent years, both international practice and international theory slowed down considerably in their interest for this subject, and that is why it may be useful to remind the reader that the fundamental rights of man are, as a matter of principle, of international concern.

The American reader, traditionally devoted to a scheme of inalienable

rights of the individual, will find this volume particularly interesting. It is an excellent witness of the transformation which this doctrine, authoritatively formulated during the American and the French revolutions, has undergone in Central Europe under the influence of current political trends. These trends emphasize the intrinsic importance of the group: the "corporate" economic unit, the nation, the state. In keeping with these philosophies, the sphere of the fundamental rights of the individual is restricted, and that of the fundamental rights of the group is considerably extended.

All this will be found reflected in Dr. Westphalen-Fürstenberg's volume. It deals with the solutions adopted in Germany, Austria, Italy, Czechoslovakia and Russia. But his specific approach is not a juristic one. It is definitely one of social philosophy. There is no attempt to undertake a comparative and detached study of the social-philosophical backgrounds of the problem. The book is frankly and emphatically based upon one particular brand of social philosophy, that of universalism (a conception of society stressing the preëminence of "organic" groups such as the nation and the state, opposed to individualistic liberalism, and trying to avoid confusion with the collectivist philosophy adopted by Marxian socialism; the latter, universalists reject as "mechanistic"), and expounds the doctrine of its followers in the matter of fundamental rights. The author is also strongly influenced by the Catholic doctrine. Consequently, he heartily approves of the underlying philosophies of government current in Austria and in Italy, and is somewhat critical of certain trends prevailing in Germany.

BENJAMIN AKZIN

• *Japan in Crisis.* By Harry Emerson Wildes. New York: Macmillan Co., 1934. pp. x, 300. Index. \$2.00.

This book is an attempt, in journalistic style, to picture post-war Japan, and in particular, to explain the inconsistencies in Japanese assurances and Japanese practices in regard to militarism, defeat of parliamentarianism and aggressive foreign policy following the fateful days of September, 1931. The author professes utmost confidence in the Japanese people as individuals, but, on the other hand, he holds that there are certain cultural and social situations that dictate a foreign policy far from friendly and peaceful.

In order to search out the causes of these inconsistencies, the author examines the national spirit, the universal reverence for the Emperor, the creed of the fanatical patriots, the propaganda for nationalism, the anti-foreign agitation, the position of the laborer and the peasant, the radical and communist movements, immorality, student life, the police, political parties and commercial corruption, the position of women, the censorship of the press, militarism and fascism, and colonial rule in Korea and Formosa.

It is obviously impossible fully to explain the inconsistencies of Japanese domestic and foreign policy within the covers of a popular book. Although the author's explanations are not wholly convincing, he succeeds in painting

a tolerably accurate picture of Japanese psychology, economics and politics. There are numerous errors which detract from the confidence that the reader would like to place in the author of *Social Currents in Japan*, a scholarly treatise published by Dr. Wildes in 1927. For instance, the statement (pp. 114-115) that Professor Oyama was expelled from Waseda University in 1927 requires correction. It is true that after his election as leader of the Labor-Farmer party, Professor Oyama resigned from the faculty; but his resignation was accepted and he was invited to assume a lectureship, which he wisely declined. The great university founded by Count Okuma had not, at the time of this episode, descended to the subserviency described by Dr. Wildes.

The statement that the farmers of Japan have had few votes in the past (p. 88) is only partly true. The farmers have always had the same franchise as the city laborers, and since 1925, when the last tax qualification was abolished, all males above twenty-five years of age in Japan have voted. It is an exaggeration to say that the Diet is little more than a debating hall (p. 156). This is not even the case today, and much less so during the frequent periods since 1918 when party cabinets have prevailed. Nor is it accurate to say that the Privy Council is the only deliberative body in the Empire to discuss foreign relations (p. 163). Prolonged discussions occur in the budget committees of the Peers and of the House of Representatives.

There are other errors, but space forbids their enumeration. A little more adroitness would have helped to banish the suspicion of prejudice or sensationalism. In fairness to the people under investigation, the author might well have added that the British in the latter half of the nineteenth century were almost as fearful of the Russian peril in Central Asia as are the Japanese today (see p. 16). And again, Japan is not the only state that has depended on secret diplomacy (p. 10).

KENNETH COLEGROVE

#### Briefer Notices

*Die Volksabstimmung im Saargebiet.* By Viktor Bruns. (Berlin: Carl Heymanns, 1934. pp. viii, 183. Rm. 4.80.) This short presentation of the rights of Germany regarding the Saar under the Treaty of Versailles by the Chairman of the Committee on International Law of the Akademie für Deutsches Recht and Director of the Institut für Ausländisches Recht und Völkerrecht, is a clear and extremely moderate statement of the German contentions. The account of the genesis and evolution of the Saar provisions at the Paris Conference is based on most painstaking research, and is accompanied in the appendix by the texts of documents chiefly from the collection published by Mr. David Hunter Miller. The book, which was published in December, 1934, does not deal with the plebiscite itself but was written to support the German argument that the Saar provisions were a breach of the solemn pre-Armistice agreements of the Allies with Germany, and to maintain that the treaty required that the League in its decision as to sovereignty must follow the result of the voting; that this decision must be final; that division of the Territory, while possible under certain provisions, would be contrary to the general tenor of the treaty articles; and that the final award

must be without any conditions as to treatment of special groups in the area. The outcome of the vote and the skill of the League Council in securing previous guarantees from the government of the Reich have rendered these arguments academic. The book will, however, have an important place in the voluminous bibliography on the Saar, and will simplify the task of one wishing to find a succinct and authoritative statement of the German view.

*The Saar Struggle.* By Michael T. Florinsky. (New York: Macmillan Co., 1935. pp. xvi, 191. Index. \$2.00.) First published in November, 1934, this book deals with the history of the Saar from the Peace Conference until some three months before the plebiscite, which was held on January 13, 1935. After a short account of the treaty provisions regarding the Saar, and a discussion of the fourteen years of the League régime and of the many issues arising between the Governing Commission and the inhabitants, the book gives a lucid exposition of the economic factors, production, trade relations, and transportation, and of the position of labor. With an insight gained by personal observation during the summer of 1934, the author gives a most interesting and impartial description of the various parties and their desires. The understanding of the difficulties of the Governing Commission, so frequently evidenced by Mr. Florinsky, fails somewhat when he discusses the reorganization of the police force for the plebiscite, and the introduction of neutral officers. In any plebiscite it is impossible to secure an impartial maintenance of order by police consisting almost entirely of men belonging to one of the contending parties. The author does not deal with the plebiscite machinery, which was installed early in July, 1934, or with the processes of registration, which began shortly after. In discussing the probable outcome of the plebiscite Mr. Florinsky rightly appreciated that the German character of the inhabitants and the policy to be adopted by the Catholic Church would be more compelling than economic factors.

SARAH WAMBAUGH

*An Introduction to the Documents Relating to the International Status of Gibraltar, 1704-1934.* By Wilbur C. Abbott. (New York: Macmillan Co., 1934. pp. viii, 112. Index. \$2.50.) The Rock of Gibraltar has played a rôle in international affairs far greater than its size or even its position has warranted. If Great Britain had remained in Tangier as she once contemplated, she would probably never have taken Gibraltar and the Sentinel of the Mediterranean might never have become more than a fairly important strategic position. But Great Britain seized it and made it the carefully guarded key of her empire. The result has been a very considerable growth of literature relating to it. The present work consists of a brief historical sketch of Gibraltar, emphasizing its international rôle, and a bibliography of materials relating to it during the British occupation. Five hundred and seventy-two items are listed, including some two score unpublished manuscripts. It will be an invaluable aid to anyone doing research in this field.

*Ceylon Under British Rule 1795-1932.* With an account of the East India Company's embassies to Kandy 1762-1795. By Lennox A. Mills. (New York: Oxford University Press; London: Humphrey Milford, 1933. pp. viii, 312. Index. \$5.00.) So long as colonial administration is an important problem in governmental procedure, British rule in India will be carefully examined by students. However, this field is so vast that it would seem to lend itself properly to some sort of division. Under these circumstances, Ceylon is an ideal subdivision to consider intensively.

Here is an administrative unit which for over a century has been governed in a way that reflects great credit upon the political genius of the British. The changing times and conditions are constantly met with a governmental system which is adapted to the new situation. Dr. Mills has devoted particular attention to the first ninety years of the colony's development, utilizing documents in the Colonial Office and India Office archives. Subsequent developments are summarized briefly with special attention given to the economic problems. Transportation, agriculture, education, and public works receive adequate attention. The bibliography of primary sources is extensive and Dr. Mills has increased the limited studies in colonial administration by a very scholarly monograph.

GRAHAM STUART

*French and German Public Opinion at Declared War Aims 1914-1918.* By Ebba Dahlin. (Stanford University: Stanford University Press, 1933. pp. 168. Index. \$2.00.) Within its clearly defined limits, Miss Dahlin's meritorious doctoral dissertation is an impartial and useful preliminary survey of a largely unexplored field, based upon the varied resources of the Hoover War Library at Leland Stanford University. Her conclusions, if not distinctly novel, carry conviction. Virtually unanimous affirmations of defensive purposes in 1914 were followed by a contest between the nationalists and moderates which increasing war-weariness resolved in the latter's favor by 1917. The blame for the failure to negotiate peace in that year is attributed to the two governments and to the necessities which the author identifies as "fate" with something less than complete accuracy. More attention might profitably have been given to the nationalist tendencies of liberal opinion, to the little-known drift toward particularism in Bavaria and to the French provincial press which is entirely neglected in this study.

*Opinions and Policies at Paris, 1919. Wilsonian Diplomacy, the Versailles Peace, and French Public Opinion.* By George Bernard Noble. (New York: Macmillan Co., 1935. pp. xii, 465. Index. \$3.50.) Professor Noble parallels a balanced and up-to-date account of official policies with a more detailed and original analysis of French public opinion as expressed by representative Parisian and provincial newspapers in its reactions to the principal problems of the Paris Peace Conference. This impartial study shows that the Socialists from the first were alone in calling attention to the dangers of drastic treatment of Germany and alone gave unwavering, if embarrassing, support to Wilson's program. The Radical Socialists were almost as extravagant in their claims and expectations in regard to reparations and the left bank of the Rhine as the nationalists. French opinion at first was surprisingly resigned to Austria's union with Germany as inevitable. The author accounts for the repercussions in France of the anti-Wilsonian trend in American politics, the harmful results of inadequate publicity as to the work of the conference, and is commendably skeptical in estimating the influence of opinion upon French official policy.

E. MALCOLM CARROLL

*La Condition Juridique des Cartels Internationaux.* By J. Demay. (Paris: Recueil Sirey, 1935. pp. iv, 163.) The author describes the various forms of international cartels and trusts, from the simple "gentlemen's agreement" to the most complex organizations. He discusses the legislation, often only of a fragmentary character, under which international cartels may be carried on, or by which their activities are restricted or entirely prohibited. Much emphasis is laid upon a proper system of commercial arbitration in order to insure the execution of cartel agreements. The author gives some examples of arbitration clauses in cartel agreements. He also discusses some

of the problems of private international law arising out of such agreements. He believes that international cartels are a concomitant of our highly organized industrial system and that, under proper regulation, they can be made to subserve useful social purposes.

*Beiträge zum Problem der internationalen Doppelbesteuerung. Die Begriffsbildung im internationalen Steuerrecht.* By Wilhelm Wengler. (Berlin and Leipzig: Walter de Gruyter & Co., 1935. pp. xiv, 198.) The author of this monograph disclaims any intention of indicating the correct way to avoid international double taxation. He considers it to be of greater importance to analyze the technical legal problems which arise in connection with the interpretation and application of existing and proposed treaties dealing with this subject. Unless these problems are well understood through an examination of the tax legislation and administration of the various countries, the advantages to be gained from such treaties are likely to be disappointing. Accordingly, the author discusses the conflict in the definitions of words supposed to be analogous and shows how very different is the interpretation given by courts and tax authorities in different countries. Indeed these differences sometimes exist within a single country and he quotes Lord Wrenbury in a judicial interpretation of the Income Tax Acts as follows: "The same word is in one section used in one sense and in another in a different sense." (p. 11, note.) The author contrasts words such as "residence," "domicil," "carrying on business," "inheritance," and other words commonly used in tax legislation with their equivalents in other languages and with commendable industry examines the interpretation given to each. Without this knowledge, treaties on double taxation are likely to lead to unsatisfactory results. The author does not favor multipartite treaties with many countries participating. He prefers to confine such treaties to smaller groups of nations where workable solutions may be found, fair to the revenue systems of each (pp. 186-187).

ARTHUR K. KUHN

*International Socialism and the World War.* By Merle Fainsod. (Cambridge: Harvard University Press, 1935. pp. xii, 238. Index. \$2.50.) The aim of this volume, according to the author, is to provide "a case study in the disintegration of the international Socialist community under the impact of national passions aroused by the war." Yet, having read the book, one is inclined to the opinion that Dr. Fainsod has accomplished more than he anticipated. While portraying the rôle of this impact—in itself a valuable contribution to the literature on war for those interested in war psychology—he has added to the list of books on international socialism a long-awaited, compact account of the struggle staged by the Second International prior to surrendering to its militant successor, the Third International. Avoiding undue details, the author describes with scholarly thoroughness the friction which arose in the socialist ranks prior to 1914, and narrates the events which took place on the political battlefields at Zimmerwald, Kienthal, Petrograd, Stockholm and, finally, Moscow, the birthplace of the Communist International. The well-selected bibliography and frequent references to authoritative sources strengthen the work by making it not only of interest to the casual reader, but of value to scholars and students of socialism as well. It is to be regretted only that fuller use has not been made of the Russian Communist literature. This, however, may have been not unintentional in view of the promised sequel to this volume.

T. A. TARACOUZIO

*Die Rechtliche Stellung Christlicher Missionen in China.* By Dietrich Husemann. (Berlin: Carl Heymanns, 1934. pp. x, 119. Rm. 6.) This is an admirable and objective study of the unique legal status of the foreign missionary enterprise in China. Treaty provisions, legislative enactments and ordinances from 1842 to 1932 are analyzed and their effect upon the enterprise evaluated. The legal problems considered include the right of propagandizing, traveling in the interior, foreign protection and intervention in behalf of foreigners and Chinese converts, official rank, non-religious and commercial activities, regulation of mission schools, and the effect of the abolition of extraterritoriality. Only the difficult legal problems involved in land tenure fail to receive adequate attention.

NORMAN J. PADELFORD

*Political Handbook of the World, 1935.* Edited by Walter H. Mallory. (New York: Harper & Bros., 1935. pp. vi, 201. \$2.50.) The latest edition of this valued annual gives as of January 1, 1935, the principal personages of the different governments of the world with important party platforms and data as to the form and composition of the legislative chambers, etc. As in the preceding issue, information is supplied in regard to the political affiliations of the principal organs of the press and the names of the proprietors or editors. At the beginning of the account of each state it is convenient to find given the area and population. Six pages are devoted to the League of Nations, the World Court and the International Labor Office. In order to crowd into 200 pages a field so vast, it has been necessary to reduce comment or explanation to a minimum. Nevertheless the notes are never trite or perfunctory, but as informative as possible with such rigid condensation. At this time when so many books of reference have had to be discontinued, it is matter for congratulation that this succinct compendium of important and authoritative information continues to appear.

*The New Deal and Foreign Trade.* By Alonzo E. Taylor. (New York: Macmillan Co., 1935. pp. xvi, 301. Index. \$3.00.) This book, by a recognized authority in the field who is Director of the Food Research Institute, Stanford, California, is professedly a criticism of the foreign trade policy advocated by Secretary of Agriculture Wallace in the pursuit of his "planned middle course." According to the view of the author "the preference for direct over multilateral trade is a short-sighted mistake; quotas will turn out to be a restraint of commerce at the best and a boomerang at the worst." (p. 291.) He predicts that "the baton will pass to the hand of the Secretary of State" and that "the world will turn from planned and managed foreign trade to simple rules, lower tariffs and most-favored-nation treatment." (p. 296.)

ELLERY C. STOWELL

*Canada and the American Revolution: The Disruption of the First British Empire.* By George M. Wrong. (New York: Macmillan Co., 1935. pp. xiv, 497. Index. \$5.00.) This is the third volume of Professor Wrong's *History of Canada*. It is a survey of the American Revolution from a new standpoint, that of the citizen of the Dominion of Canada. He begins with the new political organization of Canada after the expulsion of the French in 1763 and takes the development of the provinces—the two provinces of Quebec and Nova Scotia—through the year of the peace of 1783. Throughout these twenty years it was the difficulties between the British Government and the Thirteen Colonies of the Atlantic seaboard which made the two decades vitally

critical for the future nation of Canada. The key to British loyalty in Canada, paradoxically, was the French Canadian, who receives proper attention in this study. "Quebec remained British because it was French." While this work cannot be said to present any contribution to historical knowledge—the recent volume by A. L. Burt on *The Old Province of Quebec* preempted that achievement—and while the specialist will pick flaws in details, it is really notable for the sustained excellence of its style, the temperate quality of its judgments, the richness of allusion to present-day interests, and its confirmed and inveterate fair-mindedness. The author knows well both peoples and their histories. The title is fashioned to capture readers south of the line and the contents will make them willing captives.

SAMUEL FLAGG BEMIS

*Die Filmzensur.* By Dr. Kurt Zimmereimer. (Breslau-Neukirch: Alfred Kurtze, 1934. pp. xvi, 227. Rm. 10.) This book includes two parts. The first discusses methods of film censorship, while the second traces the origin and evolution of this form of regulation. The first treats the problem broadly, touching upon the censor as a political institution, its technical, artistic and economic significance as well as the possibility of public danger from the films. In the second part the regulatory evolution of film censorship in Germany and the leading foreign countries, including the United States, is developed in some detail. There is a brief concluding chapter on international film censorship. As early as 1914, the possibility of world censorship was discussed. This proposal envisaged an international committee, a study of all existing national systems of censorship, and the formulation of a code embodying principles on which there could be general agreement. It does not appear that development in the international field has progressed very far. The book is well documented and contains a comprehensive citation of the current authorities in this field of legal literature.

HOWARD S. LEROY

*Der Angriff. Eine völkerrechtliche Untersuchung über den Begriff.* By Dr. Konrad Reichhelm. Berlin-Grünwald: Verlag für Staatswissenschaften und Geschichte, 1934. pp. 70. Rm. 4.80.

*Das Problem des völkerrechtlichen Angriffs.* By Dr. Wilhelm G. Hertz. Leiden: Sijthoff, 1935. pp. 183. Index. Fl. 3.60.

*Die Nichtangriffspakte. Zugleich ein Beitrag zu dem Problem des Angriffsbegriffes.* By Dr. Günther Wasmund. Leipzig: Robert Noske, 1935. pp. xvi, 126. Rm. 5.

The game of defining aggression, it appears, is still being played. This reviewer was one of the early devotees of this form of intellectual diversion, but he has now laid it aside, along with crossword puzzles. If it were necessary, in order to state a rule against war, to find a workable definition of aggression, scholars would be justified in tireless study; but it is much easier to forget the whole concept of aggression and state the rule in other words.

The three books above offer proof of the futility of the study. Dr. Reichhelm, after a brief historical survey, goes into an analytical study of the question, and issues with two definitions. One is of factual aggression, a unilateral act of military force, undertaken first by one state, which does injury to the characteristics of existence or to the necessities of life in another state. The other is of subjective aggression, which is the subjective responsibility for the taking of measures of war. Both definitions, he observes, have their uses; it is the moral character of the problem which makes it everlasting.

Dr. Hertz, on the other hand, after a brief analytical survey, goes into an

historical study of the efforts to define aggression, and emerges with this vicious circle: only prohibited aggressions are aggressions; if all aggressions are prohibited, it is tautology. This logical dilemma is well worthy of consideration; it would seem better to say that illegal acts are illegal, but it is not clear that the author arrives at this conclusion. He does, however, hope that the Russian definition will lead to a general treaty renouncing both force and aggression. It is a valuable historical study, and interestingly presented.

Dr. Wasmund undertakes first to discover the objective elements in aggression. It is clear that the element of force is essential; and he dismisses, after due consideration, economic, psychic, and other elements. On the other hand, aggression is not the same as war, for it is unilateral, whereas war is bilateral. Subjective elements must be united with the objective—both are needed. He distinguishes between illegitimate war and illicit war, and thinks that aggression is neither. It is possible also to have aggression without guilt. After a study of non-aggression pacts (a table summarizes 19 of them) he concludes that it is still an academic question, and that we shall never have peace until Germany is given equality.

It is probable that these books have analyzed the question as thoroughly as need be; and it is striking that they are unable to discover a workable definition. Others who have tried it have fared no better, whether scholars or statesmen. And if this be true, it would seem preferable to seek another statement of the rule which is to declare what war is illegal. This reviewer is convinced that the rule must be stated in terms which omit the concept of aggression and the concept of war as well. How aggression came to be regarded as the heart of the problem will doubtless remain forever one of the great unsolved mysteries.

CLYDE EAGLETON

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